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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1236.

THE UNITED STATES ON THE RELATION OF GEORGE B. CHANDLER, PLAINTIFF IN ERROR,

vs.

HENRY J. LEE, MILTON MAY, AND JAMES CALDWELL, MEMBERS OF AND CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF DODGE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED JANUARY 2, 1884.

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1 Pleas in the circuit court of the United States for the eighth judicial circuit court and district of Nebraska, before the Hon. George W. McCrary, judge of the circuit court of the United States, for the district of Nebraska, and the Hon. Elmer S. Dundy, judge of the district court of the United States for said district, sitting in said circuit court, at the term of November, 1883.

Be it remembered, that on the 12th day of July, 1883, a petition was filed in the office of the clerk of said circuit court, which said petition is in words and figures following:

In the Circuit Court of the United States for the District of Nebraska.

THE UNITED STATES on the relation of GEORGE B. CHANDLER, Plaintiff,
vs.
HENRY J. LEE, MILTON MAY, and JAMES CALDWELL, members of and constituting the Board of County Commissioners of the County of Dodge, Defendants. } Petition.

The said George B. Chandler says he is a resident of the city of Manchester, in the State of New Hampshire, and a citizen of the State of New Hampshire. That the defendants, Henry J. Lee, Milton May, and James Caldwell, are members of and constitute the Board of County Commissioners of the county of Dodge, and are each citizens of the State of Nebraska.

That said Dodge county is a municipal corporation organized under the laws of the State of Nebraska. That Fremont precinct is a local sub-division of said Dodge county. That on the

2 1st day of September, A. D. 1871, the then county commissioners of said Dodge county, issued under and by virtue of the provisions of an act of the Legislature of the State of Nebraska, approved February 15th, 1869, entitled "An act to enable the counties, cities, and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvements in this State, and to legalize bonds already issued for such purpose," the special bonds of said Fremont precinct in the sum of fifty thousand dollars, payable in twenty years from the date thereof, for the purpose of building a wagon bridge across the Platte river in said precinct, which said bonds had interest coupons thereto attached for the annual payment of the interest thereon at the rate of ten per cent. per annum. Plaintiff says that afterwards he became the *bona fide* owner and holder of a portion of said bonds, with interest coupons attached, which said bonds, with interest coupons attached, he purchased in the usual course of trade, for value before maturity, and without notice of any defect or infirmities, if any, existing against the said bonds.

That afterwards, to wit, on the 4th day of April, A. D. 1880, plaintiff commenced his action in the circuit court of the United

States for the district of Nebraska, against the county of Dodge, to recover a judgment due upon past-due coupons so owned and held by plaintiff.

That such proceedings were had in said action, that at the May term, 1882, of said court, to wit, on the 20th day of September, 1882, a judgment was rendered by said court in favor of plaintiff and against said "The County of Dodge" for the sum of $3,325.96 and costs of suit, taxed at $41.87, which said judgment provided that the same should be paid by the levy of a tax upon the taxable
3 property within said Fremont precinct, in said Dodge county, as said precinct was constituted on the 1st day of September, 1871.

From which said judgment the plaintiff remitted the sum of $142.65, as error in computation. Plaintiff says that said judgment is now in full force, and that the same is wholly unpaid, except the amount remitted as aforesaid.

That afterwards, to wit, on the 5th day of October, A. D. 1882, plaintiff commenced his action in the circuit court of the United States for the district of Nebraska against "The County of Dodge" to recover a judgment for the amount due upon past-due coupons so owned and held by plaintiff. That such proceedings were had in said action that at the November term, 1882, of said court, to wit, on the 19th day of December, A. D. 1882, a judgment was rendered by said court in favor of plaintiff and against said "The County of Dodge" for the sum of $3,982.16 and costs, taxed at $51.65—which said judgment provided that the same should be paid by the levy of a tax upon the taxable property within said Fremont precinct as constituted on the 1st day of September, 1871.

Plaintiff says that said judgment is now in full force, and that the same is wholly unpaid; the amount of tax to be levied to pay such judgments being left open for consideration upon hearing of application for a mandamus to compel levy; that there are no funds in the treasury of said county with which said judgments or any part thereof can be paid.

Plaintiff says that said Board of County Commissioners have failed and refused to levy a tax upon the taxable property within said precinct, and have failed and refused to levy a tax upon any property whatever, though requested so to do by plaintiff for the purpose of paying said judgment.

Plaintiff says that he is entirely remediless, unless aided by the mandatory order of this court.

4 Wherefore plaintiff prays that a peremptory writ of mandamus be granted, directed to the said defendants and each of them, directing and commanding them and each of them to meet and assemble as a board of county commissioners, at the county seat of said Dodge county, and levy a tax upon the taxable property within the territory comprising said Fremont precinct, on the 1st day of September, 1871, sufficient in amount to pay the amount due plaintiff upon his said judgments, and cause said tax to

be placed upon the tax-roll or tax-list of said county, and for such other and further relief as he may be entitled to.

W. H. MUNGER,
Pl'ff's Att'y.

UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

W. H. Munger, being duly sworn on his oath, says he is the attorney for the plaintiff; that plaintiff is a non-resident of and now absent from the State and district of Nebraska; that the facts stated in the foregoing petition are true.

W. H. MUNGER.

Subscribed and sworn to before me, this 12th day of July, A. D. 1883.

ELMER D. FRANK, *Clerk.*
By A. L. FRANK, *Deputy.*

Upon the back of said petition appear endorsements, in words and figures following, to wit: No. 79 H. United States *ex rel.* George B. Chandler, plaintiff, *vs.* The County of Dodge, defendant. Petition. Filed Jul. 12, 1883. Elmer D. Frank, clerk. W. H. Munger, pl'ff's att'y.

Thereupon afterwards, to wit, on the 2d day of August, 1883, an alternative writ of mandamus was filed in said case, which said alternative writ is in words and figures following, to wit:

5 In the Circuit Court of the United States for the District of Nebraska.

The President of the United States of America to Henry J. Lee, Milton May, and James Caldwell, members of and constituting the Board of County Commissioners of the county of Dodge, (Nebraska,) Greeting:

Whereas it has been suggested to us that on the 1st day of September, 1871, the then county commissioners of said Dodge county issued under and by virtue of the provisions of an act of the Legislature of the State of Nebraska, approved February 15th, 1869, entitled "An act to enable counties, cities, and precincts to borrow money on their bonds or to issue bonds to aid in the construction or completion of works of internal improvements in this State, and to legalize bonds already issued for such purposes," special bonds for Fremont precinct (a local subdivision of said Dodge county) in the sum of fifty thousand dollars, payable in twenty years from the date thereof, for the purpose of building a wagon bridge across the Platte river in said precinct, which said bonds had interest coupons thereto attached for the annual payment of the interest thereon at the rate of ten per cent. per annum. A portion of which said bonds, with interest coupons attached, were purchased by George

B. Chandler, *bona fide*, in the usual course of trade, for value before maturity, and without notice of any defects or infirmities existing against said bonds.

That afterwards said George B. Chandler, a resident of Manchester, in the State of New Hampshire, and a citizen of the State of New Hampshire, commenced an action in the circuit court of the United States for the district of Nebraska against the said "The County of Dodge," a municipal corporation organized under
6 the laws of the State of Nebraska, and a citizen of said State of Nebraska, to recover a judgment for the amount due upon past due coupons on said bonds so owned and held by said George B. Chandler. That such proceedings were had in said action that at the May term, 1882, of said court, to wit, on the 20th day of September, 1882, a judgment was rendered by said court in favor of plaintiff, and against the said "The County of Dodge" for the sum of $3,325.96, and costs of suit taxed at $41.87, from which said judgment the plaintiff has remitted the sum of $142.65. And that afterwards said George B. Chandler commenced a second action in the said circuit court of the United States for the district of Nebraska against the said "The County of Dodge" to recover a judgment for the amount due upon past due coupons on said bonds owned and held by him. That such proceedings were had in said action that at the November term, 1882, of said court, to wit, on the 19th day of December, A. D. 1882, a judgment was rendered by said court in favor of plaintiff and against said "The County of Dodge" for the sum of $3,982.16 and cost of suit taxed at $51.65, which said judgments each provided that the same should be paid by the levy of a tax upon the taxable property within said Fremont precinct, as constituted on the 1st day of September, 1871, which judgments each bears interest at 7 per cent. per annum from the date thereof, and that said judgments are each still unreversed, unimpeached, and in full force and effect, and have not been paid or satisfied, or any part thereof, and that you have refused to levy a tax to pay said judgments, or to make any provision for the payment and satisfaction thereof, although often requested by and on behalf of said plaintiff. And it appearing that the relator has
7 no adequate remedy at law for the recovery of said judgments and costs, interest, and accruing costs, and would be wholly remediless except by the interposition of the court.

Now, therefore, we being willing that full and speedy justice should be done in the premises, do command you forthwith to pay off and satisfy said judgments and costs, interest, and accruing costs, and that in case you have not funds under your control or at your command with which to pay the same, that then you levy forthwith, and cause to be collected in the same manner as other taxes for the year 1883 are levied and collected, a special tax upon the taxable property within said Fremont Precinct, as constituted on the 1st day of September, 1871, sufficient to pay off and satisfy said judg-

ments and costs, interest, and accruing costs, as aforesaid, and that you, and each of you, appear before this court at Omaha, Nebraska, on the 27th day of August, 1883, and certify to the court that you have done as herein commanded, or then and there show cause why you have not so done.

Witness our hand and the seal of said court this 12th day of July, A. D. 1883.

[SEAL.] ELMER S. DUNDY, *Judge.*

Attest:

ELMER D. FRANK, *Clerk.*

Attached to said alternative writ of mandamus is the return of the marshal, in words and figures following, to wit:

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 12th day of July, 1883, I received this writ, and on the 1st day of August, 1883, I served the same upon the within-named Henry J. Lee, Milton May, and James Caldwell, members of and constituting the Board of County Commissioners of Dodge county, Nebraska, in Dodge county, State and district of Nebraska, by delivering to and leaving with each an original thereof, signed by Elmer S. Dundy, judge.

ELLIS L. BIERBOWER,
United States Marshal for the District of Nebraska.
By R. E. ALLEN,
Deputy United States Marshal.

Upon the back of said alternative writ appear endorsements in words and figures following, to wit: No. 79 H. United States, *ex rel*, George B. Chandler *vs.* The County of Dodge. Alternative writ, filed Aug. 2, 1883. Elmer D. Frank, clerk. Marshal's costs: service, $6.00; mileage, $2.82; total $8.82.

Thereupon afterwards, to wit, on the 27th day of August, 1883, an answer to alternative writ was filed in said case, which said answer is in the words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

THE UNITED STATES, *ex rel.* GEORGE B. CHANDLER
vs.
HENRY J. LEE, MILTON MAY, JAMES CALDWELL, Members, &c., County Board, Dodge Co., Neb.

And now come the said Henry J. Lee, Milton May, and James Caldwell, members of and constituting the Board of County Commissioners, of Dodge county, Nebraska, and for answer to the alternative (writ of) mandamus heretofore issued in this court in this cause, say that the said plaintiff ought not to have their said writ of peremptory mandamus because they say:

First. That it appears from the face of said alternative
9 mandamus that said judgments therein set forth was recovered upon interest coupons attached to special bonds of said Dodge county, to be paid by a levy upon the property of said Fremont precinct as constituted on the 1st day of September, 1871, and these respondents allege that the proposition to vote said bonds was submitted by the Board of County Commissioners of said county to the voters of said Fremont precinct, and to them alone, at an election held in said precinct on the 11th day of November, A. D. 1870, and the same as voted upon at said election, contained the following provision: "It is proposed that for the purpose of raising a sinking fund to pay the principal, interest, repairs, and contingent expenses, the said bridge shall be a toll bridge, the rates of toll to be fixed and regulated from time to time by said County Commissioners, and collected in pursuance of their order, and such tolls shall not be used for other purposes than above mentioned, and if said tolls collected shall not at any time be sufficient to pay the interest as the same shall become due on said bonds, and keep up necessary repairs and contingent expenses, and also create a sufficient sinking fund to pay the principal of said bonds as the same shall mature, then the said County Commissioners shall make a levy upon the taxable property of said precinct in addition to the usual taxes for that purpose, and continue from year to year until said bonds are paid, and cause the same to be collected; provided that in any one year such levy shall not exceed one mill on the dollar of the valuation of the taxable property of said precinct;" that the Board of County Commissioners of said county, have from year to year since said bonds were issued levied said tax of one mill on the dollar of the valuation of the taxable property of said precinct, and that these respondents have, for the year 1883, levied said tax of one
10 mill on the dollar of the valuation of the taxable property in said precinct; that said provision hereinbefore recited was all the provision contained in said proposition touching the levy of a tax to pay the interest on said bonds.

Second. That at the time of the voting of said bonds by the voters of said precinct; the statute of the State of Nebraska, contained a provision limiting the levy of a tax to pay moneys borrowed to aid in the construction of any road or bridge to a rate not exceeding one mill on the dollar valuation. (See Rev. Statute 1866 of Nebraska, page 41, sec. 23).

Third. That said bonds were issued to the Smith Bridge Company to construct a bridge across the Platte river in said precinct as appears of record in the causes in this court, wherein said judgments were rendered from the copies of one of said bonds attached to the petition of the plaintiff herein which is made part hereof.

Fourth. That said bridge has for the space of ten years last past been of no use or service, the same having been by reason of its defective construction thereof washed out and torn away by said Platte river, and for want of funds it has not been rebuilt.

Fifth. That under the law and the limitation in said proposition contained, these respondents have been advised and believe that no greater levy than a tax of one mill on the dollar of the valuation of the taxable property of said precinct was required by them to be made in any one year, and for that reason, and for that alone, they have made no greater levy for the year 1883, which valuation is less than $1,000,000.

Sixth. These respondents deny that said bonds are special precinct bonds, but on the contrary, allege that they are special county bonds of the said county of Dodge.

11 Seventh. These respondents further answering say, that said proposition containing said provision to vote said bonds, and also the result of the vote thereon was duly entered upon the records of said county as by law in that behalf required, immediately after said election upon said proposition was had, and before said bonds were issued by said county, and a notice of the adoption of said proposition containing said provision was duly published for two successive weeks in the Fremont Tribune, a weekly newspaper of general circulation, published in said precinct, as by law required in that behalf; that said record has from thence hitherto always been open to the inspection and examination of all persons whomsoever, and of the plaintiff.

Eighth. These respondents say that they have no funds with which to pay said judgments. The respondents hereto attach a certified copy of said bonds and marked "Exhibit A," and a certified copy of said proposition marked "Exhibit B," and made parts hereto.

These respondents therefore pray to be hence dismissed with their reasonable costs in this behalf expended, and for other relief.

HENRY J. LEE,
MILTON MAY, x
JAMES CALDWELL,
Respondents.
By WILLIAM MARSHALL,
Their Attorney.

STATE OF NEBRASKA, } *ss:*
County of Dodge, }

Henry J. Lee, being first duly sworn, on his oath states, that he is one of the respondents in the above-entitled action and is chairman of the board of county commissioners of said Dodge county, that he is authorized by each of the other members of said

12 board to make this verification, and that the facts stated in the foregoing answer are true as he verily believes.

HENRY J. LEE.

Subscribed in my presence and sworn to before me, this 27th day of August, A. D. 1883.

[SEAL.]

G. C. KERKOW,
Co. Clerk, Dodge Co., Neb.

EXHIBIT A.

UNITED STATE OF AMERICA, *State of Nebraska:*

It is hereby certified that ———, No. ——, $1,000, Fremont precinct, in the county of Dodge, in the State of Nebraska, is indebted unto the bearer in the sum of one thousand dollars, payable on or before twenty years after date, with interest at the rate of ten per cent. per annum from date, interest payable annually on the presentation of the proper coupons hereunto annexed; principal payable at the office of the county treasurer, in Fremont, Dodge county, Nebraska; interest payable at the Ocean National Bank, in the city of New York.

This bond is one of a series issued in pursuance of and in accordance with a vote of the electors of said Fremont precinct, at a special election, held on the eleventh day of November, A. D. 1870, at which time the following proposition was submitted.

Shall the County Commisioners of Dodge county, Nebraska, issue their special bonds on Fremont precinct, in said county, to the amount not to exceed fifty thousand dollars, to be expended and appropriated by the County Commissioners, or as much
13 thereof as is necessary in the building a wagon bridge across the Platte river, in said precinct, said bonds to be made payable on or before twenty years after date, bearing interest at the rate of ten per cent. per annum, payable annually, which proposition was duly elected, adopted, and accepted by a majority of the electors of said precinct voting in favor of the proposition.

And whereas the Smith Bridge Company of Toledo, Ohio, have entered into a contract with said County Commissioners to furnish the necessary materials and to build and construct said bridge referred to in the foregoing proposition. Therefore this bond, with others, is issued in pursuance thereof, as well as under the provisions of an act of the Legislature of the State of Nebraska, approved February 15th, A. D. 1869, entitled an act to enable counties, cities, and precincts to borrow moneys on their bonds or to issue bonds to aid in the construction or completion of works of internal improvements in this State, and to legalize bonds already issued for such purposes.

In witness whereof, we, the said County Commissioners of said Dodge county, have hereunto set our hands, this —— day of ——, A. D. 1871.

——— ———, *County Commissioners.*

Attest: ——— ———, *Co. Clerk.*

THE STATE OF NEBRASKA, *Dodge County,* } *ss:*

I, G. C. Kerkow, county clerk of county aforesaid, do hereby certify that the above and foregoing is a correct and true transcript of the original record of Co. Commissioners, as shown by the records of the county aforesaid.

Witness my hand and county seal, this 13th day of April, A. D. 1881.

[SEAL.] G. C. KERKOW,
County Clerk of Dodge County, Neb.

14 EXHIBIT B.

Notice of Special Election.

Notice is hereby given that on Friday, the 11th day of November next, at the court house in Fremont, Dodge county, Nebraska, a special election will be held in Fremont precinct, in Dodge county, State of Nebraska, at which time the following proposition will be submitted to the qualified voters therein :

I. It is proposed to authorize the county commissioners of Dodge county to construct a good and substantial wagon bridge across the Platte river, near the foot of F street, in the town of Fremont, or other suitable place for the convenience of the citizens of the town of Fremont, together with approaches and roads and necessary buildings and improvements for the safety and good management of said bridge. The construction of said bridge shall be let by contract to the lowest responsible bidder.

II. It is proposed to authorize said county commissioners to issue and negotiate the bonds of said Fremont precinct, payable to bearer at the county treasurer's office of said Dodge county, on or before twenty years after the date thereof, bearing interest at the rate of ten per cent. per annum from the date thereof, to aid in the construction of said bridge, the whole amount of said bonds not to exceed fifty thousand dollars, and the interest accruing on said bonds shall be paid annually.

III. It is proposed that for the purpose of raising a sinking fund to pay the principal, interests, repairs, and contingent expenses, the said bridge shall be a toll bridge, the rates of toll to be fixed and regulated from time to time by said county commissioners and collected in pursuance of their order, and such toll shall not be used for other purposes than above mentioned, and if said tolls
15 collected shall not at any time be sufficient to pay the interest as the same shall become due on said bonds and keep up necessary repairs and contingent expenses, and also create a sufficient sinking fund to pay the principal of said bonds as the same shall mature, then the said county commissioners shall make a levy upon the taxable property of said Fremont precinct in addition to the usual taxes for that purpose, and continue from year to year until said bonds are paid, and cause the same to be collected, provided that in any one year such levy shall not exceed one mill on a dollar of the valuation of the taxable property of said precinct.

IV. It is proposed that the said county commissioners may employ some suitable person to take the tolls at said bridge, who shall give bonds as may be required by said county commissioners, which bond shall be deposited with the county clerk of said county, and

all moneys realized from tolls shall be deposited with some responsible banker at Fremont, subject to the order of the said county commissioners.

V. It is proposed that all contracts and arrangements for the said bridge, and keeping the same in repair, and in the payment of principal and interest on said bonds not specified herein, shall be left to said county commissioners to be conducted to the best interests of said precinct.

VI. It is proposed that if the county of Saunders or any precinct therein, through the county commissioners of Saunders county, Nebraska, shall at any time contribute to the county commissioners of Dodge county, Nebraska, one-half of the first cost of said bridge, with one-half of the interest that shall then have been paid and what is owing, and agree to pay from that time one-half of
16 the expense of keeping said bridge in repair, then the commissioners of the counties of Dodge and Saunders may declare the same a free bridge, and the same shall thereafter be a free bridge. But should said county commissioners of Saunders county, Nebraska, make no such contribution, then the county commissioners of Dodge county shall keep the said bridge a toll bridge until the principal and interest on said proposed bonds are fully paid and discharged, and as much longer as shall be for the interest of said Fremont precinct so to do.

It is further ordered that notice of the submission of said proposition be published at least four weeks in the Fremont Tribune, a weekly paper published at Fremont, in said Dodge county, prior to the election hereinafter mentioned; and it is further ordered that a special precinct election be held in said Fremont precinct on the 11th day of November, A. D. 1870, which election shall be opened at the hour of eight o'clock in the morning and continue open until six o'clock in the afternoon of the same day.

All persons in favor of issuing said bonds in pursuance of the foregoing proposition will vote a ballot with the words, "For issuing the bonds, yes," written or printed on the same. And all persons opposed to issuing the bonds aforesaid will vote a ballot, "For issuing the bonds, no."

By order of the county commissioners, this 8th day of October, A. D. 1870.

A. G. BRUGH,
County Clerk, Dodge County, Nebraska.

THE STATE OF NEBRASKA, } *ss:*
Dodge County, }

I, G. C. Kerkow, county clerk of county aforesaid, do
17 hereby certify that the above and foregoing is a correct and true transcript of the original record, as shown by the records of the county aforesaid.

Witness my hand and county seal, this 13th day of April, A. D. 1881.

[SEAL.] G. C. KERKOW, *County Clerk.*

Endorsed: Transcript of the proposition submitted to the electors of Fremont precinct, Dodge Co., Neb., in reference to bridge bonds. Filed Aug. 27, 1883. Elmer D. Frank, clerk.

Upon the back of said answer appear endorsements in words and figures following, to wit: No. 79 H., U. S. *ex rel.*, George B. Chandler *vs.* The County of Dodge. Answer of respondents. Filed Aug. 27, 1883. Elmer D. Frank, clerk. Wm. Marshall, att'y for respondents.

Thereupon afterwards, to wit, on the 4th day of September, 1883, a demurrer to answer was filed in seid case, which said demurrer is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

UNITED STATES *ex rel.* GEORGE B. CHANDLER
vs.
THE COUNTY OF DODGE.

And now comes the relator and demurrers to the answer of the respondents, filed to the alternative writ, for the reason that said answer does not contain facts sufficient to constitute a defense.

W. H. MUNGER,
Att'y for Relator.

Upon the back of said demurrer appear endorsements in words and figures following, to wit: No. 79 H., U. S. *ex rel.* George B. Chandler, relator *vs.* The County of Dodge, respondent.
18 Demurrer to answer. Filed Sept. 4, 1883. Elmer D. Frank, clerk. W. H. Munger, att'y.

Thereupon afterwards, at the November term of said court, on the 13th day of November, 1883, the following proceedings were had and done, as appears of record on folio 10, Journal I of said court, to wit:

THE UNITED STATES, on the relation of GEORGE B. CHANDLER,
vs.
HENRY J. LEE, MILTON MAY, and JAMES CALDWELL, Members of and constituting the Board of County Commissioners of the County of Dodge. } No. 79 H.

And now, on this day, to wit, on the 13th day of November, 1883, this cause came on for hearing on motion of the relator to vacate the order and judgment of this court, rendered on the —— day of October, 1883, and for judgment on the demurrer, and the court, after consideration thereof, does order and adjudge that the order heretofore rendered on the —— day of October, 1883, be, and the same is hereby, vacated and set aside.

Said cause was thereupon submitted to the court upon the demurrer of relator to the answer and return of the respondents to the alternative writ of mandamus issued in this cause, and the court, after consideration thereof, does overrule the said demurrer, to which ruling of the court relator duly excepts. And the court does further order and adjudge that peremptory writ of mandamus be denied, and this cause be dismissed at the cost of the relator, taxed at $48\frac{92}{100}$, to which judgment relator duly excepts.

19 Thereupon afterwards, to-wit, on the 14th day of November, 1883, a writ of error was allowed in said case, and a citation issued thereon, of which said writ of error and citation the following are the originals:

20 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the District of Nebraska, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the United States on the relation of George B. Chandler, plaintiff, and Henry J. Lee, Milton May, and James Caldwell, members and constituting the Board of County Commissioners of the county of Dodge, defendant, a manifest error hath happened, to the great damage of the said plaintiff in the said cause, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 2d Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, shall be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 14th day of November, 1883.

ELMER D. FRANK, *Clerk.*

Allowed by—
GEO. W. McCRARY,
Circuit Judge.

Endorsed: No. 79 H. United States circuit court, district of

Nebraska. U. S. *ex rel* Geo. B. Chandler *vs.* County Commissioners of Dodge County. Writ of error. Filed Nov. 14, 1883. Elmer D. Frank, clerk.

21 THE UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

To Henry J. Lee, Milton May, and James Caldwell, members of and constituting the Board of County Commissioners of the county of Dodge, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein the United States on the relation of George B. Chandler is plaintiff in error, and you are defendants in error, to show cause, if any there be, why judgments rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Omaha, this 14th day of November, 1883.

GEO. W. McCRARY,
Circuit Judge.

I hereby accept service of a copy of this citation, this 15th day of November, 1883.

WILLIAM MARSHALL,
Att'y for Defendants.

Endorsed: No. 79 H. United States circuit court, district of Nebraska. U. S. *ex rel.* Geo. B. Chandler *vs.* County Commissioners of Dodge County. Citation. Filed Nov. 14, 1883. Elmer D. Frank, clerk.

22 UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

By virtue of the foregoing writ of error, and in obedience thereto, I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios from one to 21 contain true and faithful transcripts of all pleadings, process, and proceedings of record and on file in my office as said clerk, in the case of the United States *ex rel.* George B. Chandler, "The County of Dodge," and that a copy of the writ of error and citation has been lodged and remains in my said office.

Witness my hand and the seal of said court, at Omaha, this 17th day of November, A. D. 1883.

[SEAL.] ELMER D. FRANK, *Clerk.*

Endorsed on cover: Nebraska C. C. U. S. No. 1236. The United States on the relation of George B. Chandler, pl'ff in error, *vs.* Henry J. Lee, Milton May, and James Caldwell, constituting the Board of County Commissioners of the county of Dodge. Filed 2d January, 1884.

110-156

JAN 2 1884

In the Supreme Court of the United States.

No. .....

United States Ex Rel. George B. Chandler,
Plaintiff in Error,
vs.
The County of Dodge,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

WM. H. MUNGER, Attorney.

UNITED STATES EX REL, GEORGE B. CHANDLER,

VS.

THE COUNTY OF DODGE.

STATEMENT OF CASE.

Relator having obtained two judgments in the Circuit Court of the United States, District of Nebraska, against the County of Dodge, on interest coupons due on certain bonds issued on behalf of Fremont Precinct (a local subdivision of said County) to build a wagon bridge across the Platte River in said County, under the provisions of the internal improvement act of February 15th, 1869, (Compiled Statutes of Neb., 324), made his application for a mandamus to compel the Commissioners of said County to meet and levy a tax sufficient in amount to pay such judgments.

Defendants, in answer to the alternative writ, say:

FIRST, That the proposition submitted to the electors for the issue of said bonds contained a provision for the levy of an annual tax of one mill only.

SECOND, That this proposition having been entered of record, as provided by statute, prior to the issue of the bonds, such record was constructive notice to relator.

THIRD, That the Commissioners have levied said one mill tax.

FOURTH, That the law in force at the time of the issue of such bonds only authorized the levy of a one mill tax.

To the answer of respondents to the alternative writ, the relator interposed a general demurrer.

By the demurrer it was admitted that such proposition submitted to the electors contained the provision to levy an annual tax of one mill on the dollar.

That such proposition was entered of record before the issue of the bonds.

That the Commissioners have levied the one mill tax.

The only questions for consideration being:

FIRST, Was the record of said proposition notice to the relator of the one mill limitation.

SECOND, Does the fact of such one mill provision in the proposition limit the Commissioners to that amount in making the annual levy to pay the interest of such bonds.

THIRD, Did the law in force at the time of the issue of the bonds in question limit the annual levy to one mill.

The Circuit Court overruled the demurrer, refused the peremptory writ, and dismissed the application at the cost of relator.

ASSIGNMENTS OF ERROR.

It is claimed that the Circuit court erred as appears by the record.

FIRST, In not sustaining the demurrer of relator to the defendants' answer to the alternative writ.

SECOND, In refusing to grant a peremptory writ of man-

damus to compel the levy of a tax sufficient to pay the judgments of re.ator.

THIRD, In dismissing the application of relator.

ARGUMENT.

The law is well settled that where bonds of a municipality recite on their face that they are issued under the provisions of a law authorizing the issue under any circumstances, that the purchaser need only look to the recitals on the face of the bond and the law under which issued. They are not bound to examine the record to see if all the prerequisites to a valid issue have been complied with. And the municipality is estopped after such bonds have passed into the hands of bona-fide holders from going back to the proposition under which they are voted and pointing out defects therein.

The foregoing has been so often enunciated by this Court that it has become a settled maxim of the law.

Knox County vs. Aspinwall, 21 How.
Gilpeck vs. Dubuque, 1 Wall.
Lexington vs. Butler, 14 Wall.
Moran et al. vs. Miama Co., 2 Black.
Mercer Co. vs. Hackett, 1 Wall.
And numerous other cases.

It is true that in the foregoing cases the questions were not the amount of levy which should or could be made, but the questions were as to the validity of the bonds themselves. But wherein is the principle different? If in determining the question as to whether the bonds are valid the municipality cannot resort to the record to show that the issue was not authorized, but are bound by the terms of the law recited upon the face of the bonds, is not such municipality also estopped from pointing out defects in the record when it is sought to enforce judgments

THIRD, That the Commissioners have levied said one mill tax.

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rendered on such securities? Suppose the proposition under which the bonds were issued had contained no provision whatever relative to the levy of a tax; under the law as laid down in the cases cited and numerous other cases by this court, such fact could not be urged as a defense in an action upon the bonds, and the bona-fide holder would be entitled to his judgment. Now will it be said that the same principle of estoppel does not apply when the application is one for payment, but that because the proposition contained no provision for the levy of a tax for the payment of the bonds, this fact may be shown to defeat a levy? In other words, will this court say to a party You may sow but you shall not reap. You are entitled to and may have judgment, but you shall not enforce its collection.

There can be no doubt but what if in determining the question of the validity of the bonds, the recitals on their face and the law under which issued must control and the proposition cannot be resorted to, then the proposition cannot be resorted to in determining the amount of tax to be levied for their payment, but the recitals and law under which issued must also control.

But counsel for defendant contend that the recitals on the face of the bonds show that the law was not complied with; they contend that the language used is such ("The following proposition was submitted") as to preclude the idea that there was anything more of the proposition than that recited. In other words, the bonds on their face show two things.

FIRST, A proposition submitted which does not contain all the law requires.

SECOND, A recital that the provisions of the law have been complied with.

Defendants say that these two recitals are in conflict and that the former should prevail.

Let us see whether their view is correct. The bonds and the statute under which they were issued constitute the contract. It is a fundamental rule of law that in the construction of contracts as well as statutes, full force and effect must be given to all its parts if possible, and that when two constructions may be given, that one is to prevail which permits each provision to stand and have force. That is to say, when there are two provisions which are seemingly in conflict, if a construction can be given which will permit each provision to perform its intended purpose, such construction must prevail.

What then were the evident purposes of the two recitals in the bond? The one that the bonds were issued under the provisions of the statute in question was evidently intended as a statement (which the cases we have cited say it was) that the provisions of the statute had been complied with.

The bonds being precinct or special county bonds, the statute required that they should contain a statement showing their special nature. That is, a statement showing they were bonds for the payment of which only a portion of the county was liable. The statute does not require the proposition to be set forth in full, but only so much as will notify purchasers that the bonds are special, and that the tax for their payment is only to be levied upon the property within the subdivision of the county voting them. This being all the law requires, can it be said that the proposition as shown on the face of the bonds was

intended for any other or greater purpose than to show the special nature of the bonds ; that Fremont precinct, only, could be taxed for their payment, and not the whole county? Is it not evident then that the bonds only recite so much of the proposition as is necessary to show that they were voted by Fremont Precinct and were therefore special in their nature, so that all purchasers might know that they gave no right to a tax upon the whole property of the county, but only upon that portion voting them. What other or different way would better show the special nature of the bonds as required by statute than to say as is said of these bonds, "The following proposition was submitted." Then recite sufficient to show that they were of a special character. This, then, followed with the subsequent provision that they were issued under the provisions of the statute cited, show full authority for the issue. Such a construction is in harmony with the evident purpose of the recitals. The construction contended for by defendant's counsel is technical. He insists that the court should not consider the object and purpose of the language used, but only the literal meaning of the words themselves, and that when the bonds say "The following proposition was submitted," that the court should add to it by construction the word ONLY and then say a literal construction is, that was all the proposition. If it was intended that the bonds should recite the whole proposition, would it not have used the word ONLY; then it would have been clear that that was all of the proposition submitted. But if this question is to be determined upon a literal construction of words, then we say the statute does not require the proposition to contain a provision for the levy of an annual tax to pay the interest as it

matures. Sec. 2 of the act in question (Compiled Statutes, page 324) provides as follows: "The proposition of the question must be accompanied by a provision to levy a tax annually for the payment of the interest on said bonds as it becomes due." The statute does not say that the proposition shall contain a provision for the levy of the tax, but says it shall be "ACCOMPANIED WITH" such a provision and not included in as a part of such proposition. In other words, the law requires a proposition to be submitted to the electors for their decision as to whether the bonds shall be issued for the purpose indicated, and this proposition shall have as a companion or associate a provision to levy the tax; it is not treated as a part of the proposition, nor is it such.

A somewhat fine-spun and philological point is taken in the opposing brief, turning upon the word "under" used in the recital. It is urged that this has not the same force or effect as the words "by virtue of" or "in pursuance of," sometimes and perhaps generally used in referring to the authority under which the bonds are issued. We are not prepared to say whether this particular point has arisen in any case in the Supreme Court. But upon obvious principles of construction we submit that there can be no substantial distinction made in the cases. A bond can not be issued under a law and at the same time be unauthorized by it. If issued for a purpose not authorized by the law, it certainly is not issued under it. So if issued contrary to the law, or if in any respect it be different from that which the law authorizes, it can not be said to be issued under the law. It is rather issued in defiance of it. Words must be construed according to their approved and ordinary use. There can be

no purpose or object in reciting that a bond is issued under a certain law than to inform the holder or proposed purchaser of the authority for issuing it. To say that it is issued under a specified law, when, in a material point, it is in violation of the law, would be to assert a falsehood. The plain, ordinary sense of the word is that the bonds were authorized by the law recited, and courts will not fritter away the rights of bona-fide holders by hair-splitting, word-defining distinctions.

But this question as to whether the recitals on the face of the bonds are sufficient to estop defendants from claiming a non-compliance with the statute has been fully determined in the case of the Fremont Building Association vs. Shervin, 6 Neb. 48; in that case, which involved the question of the validity of these same bonds, the Court on page 50 says, "In every formal requisite, these bonds are faultless, but it is sought to invalidate them by going back to the proposition under which they were voted, and pointing out certain defects therein." Then after citing the law as to the municipality being concluded by the recitals in accordance with the rule as stated in the cases we have cited, the Court further says: "These bonds recite the fact;" then after quoting the recitals, say, "Here, then, we have a plain recital of facts which actually occurred, and which under the statute gave to the Commissioners ample authority to issue the bonds." Here we have a decision of the highest Court of the State, holding the recitals in the bonds in question to be sufficient, and that the municipality is estopped after such bonds have passed into the hands of bona-fide holders, from going back to the proposition under which they are voted and pointing out defects therein.

If then it is not competent to go back to the proposition; if the municipality is concluded by its recitals when the validity of the bonds are at issue, are not the recitals also conclusive when it is sought to regulate the levy of the tax to meet their payment; as to this there can be no question.

II.

Again it is said that the act of 1869, under which the bonds in question were issued, is *in pari materia* with chapter 9 of the revised statute of 1866, and consequently they must be construed together.

Are the two statutes *in pari materia?* A brief examination will, we think, satisfy any judicial mind that they are not. Statutes to be *in pari materia* must be upon the same matter or subject.

Bouviers' Law Dictionary.

The act of 1869 has reference to works of internal improvement, while chapter 9 of the revised statutes of 1866 relates solely to the question of borrowing money, or of extraordinary outlays, other than works of internal improvement. Counsel for defendant contends that the two statutes being *in pari materia* that section 23, of chapter 9, of the revised statutes of 1866, limits the annual tax to one mill on the dollar for bridge purposes. This section limits the rate of tax for all purposes provided for in the four preceding sections. It limits the rate to one mill for bridge purposes in any one year for the payment of principal as well as interest. The act of 1869, as originally passed, also provided for the annual levy of a tax to pay principal and interest,

but the act of 1869 was amended in 1870, the amendatory act taking effect March 3, 1870, before the bonds in question were voted (Laws 1870 and 1871, page 15); by the amendatory act the annual tax must be sufficient to pay the interest as it becomes due, there is no limitation, but an express provision that the tax shall be sufficient to pay the interest as it becomes due, and that after the year 1880, there shall be levied an additional tax to pay the principal of said bonds. These express provisions of the act of 1869, as amended in 1870, show clearly that they were not to be governed in any manner by Sec. 23, of Chapter 9, of the Revised Statutes of 1866. Being in direct conflict if the two statutes are held to be *in pari materia* then said Sec. 23, of Chapter 9, of the Revised Statutes of 1866, was repealed by Sec. 4 of the the Amendatory Act of 1870, which repeals all acts and parts of acts inconsistent therewith, and any statute which limits the amount of tax is certainly inconsistent with a statute which requires the amount of tax to be sufficient to pay the debt as it becomes due without regard to the amount. The word sufficient certainly means enough, such an amount as will pay the whole that becomes due.

Another well known and recognized rule of construction is this: If there be two statutes, one of a general and comprehensive nature, and another of a special and limited nature and scope, and there are conflicting provisions in the two acts, that one contained in the special act controls as to the subject matter of such act. Therefore, if the provisions as to the act of taxation in the two acts are in conflict, the one contained in the internal improvement act must prevail as to bonds issued under that act, even if the general act be broad enough to cover such

bonds. It is hardly necessary to support this proposition by reference to cases. But substantially the same question was before the court in the case of Fremont Building Association vs. Shervin before cited. The court commenting upon Sec. 19, Chapter 13, General Statutes, says: "But we are of the opinion that this section has no application to this sort of vote; it relates solely to the question of borrowing money or of extraordinary outlays by counties other than for the purpose of internal improvements.

This Section 19, Chapter 13, General Statutes, which the court had under consideration in the case above cited, is the same as Section 19, Chapter 9, of the Revised Statutes of 1866, and is the section which provides for what purposes the tax limited by section 23 shall be levied, and this the Supreme Court of this State have said does not apply to works of internal improvement.

It is very clear to us that the question in this case must be governed by the Internal Improvement Act of 1869. The several provisions of that act bearing upon the question are as follows:

SEC. 2. "The proposition of the question must be accompanied by a provision to levy a tax annually for the payment of the interest on said bonds as it becomes due. * * *"

SEC. 5. "It shall be the duty of the proper officers of such county or city to cause to be annually levied, collected and paid to the holders of such bonds a special tax on all the taxable property within said county or city, sufficient to pay the annual interest as the same becomes due. * * * * * *"

SEC. 6. "Any county or city which shall have issued its

bonds in pursuance of this act shall be estopped from pleading want of consideration therefor, and the proper officers of such county or city may be compelled by mandamus or otherwise to levy the tax herein provided to pay the same."

What was the object and purpose of the provision of Sec. 2, requiring the proposition to be accompanied by a provision to levy a tax annually to pay the interest on said bonds as it becomes due? Does this provision alone contain the grant of power to levy the tax in question? We think not. The grant of power by the Legislature is clearly given in Section 5 of the act, which makes it the duty of the proper officers to levy a tax SUFFICIENT to pay the annual interest as it matures on bonds which are issued under the provisions of the act in question. The language of Section 5 is plain and imperative that the tax to be annually levied shall be SUFFICIENT to pay the annual interest as it becomes due; not the amouut which the Commissioners may have thought sufficient at the time the proposition was submitted and which was inserted therein, but a SUFFICIENT amount to pay the whole interest.

Again, Section 6 provides that such officers may be compelled by mandamus to levy the tax in the act provided for. Now what tax does this Section 6 refer to? Is it the rate which may accompany the proposition, or is it the tax which by Section 5 it is made the duty of the officers to levy? Now, when we consider that the object and nature of the writ of mandamus is to compel the performance of a duty imposed by law, then it is clear that the tax alluded to in Section 6 is the one which it is made the duty of the officers to levy, and as we have said, that is the one provided for in Section 5, for Section 5 contains

the only express provision making it the duty of the proper officers to levy any tax at all, and that section requires the levy to be of a SUFFICIENT amount.

To say that a rate of tax which accompanies the proposition as provided in Section 2, is the only rate that can be levied by the Commissioners, is saying that an express provision of the Statute can be rendered nugatory by implication or by inference drawn from other preceding portions of the same enactment, which I do not understand to be the law. I take the rule to be that any clear and express provision of a Statute explains and takes the place of any prior provision regarding the same matter which is ambiguous or of uncertain meaning. Let us apply to the act in que tion a fundamental rule of construction; that the whole act be considered together, and full force and effect be given to each and all of its provisions if possible, and see what is the meaning and purpose as considered and understood by the legislative body enacting them.

Sec. 1 of the act provides that the bonds may be issued by the proper officers when the assent of the voters has been obtained in the manner provided by Sections 1, 2, 3 and 4, of the act; whenever there has been a substantial compliance with the provisions of these sections, they have performed their purpose and the proper officers are then authorized to issue the bonds; with the issue of the bonds the functions of these four sections cease, and Sections 5 and 6 are called into operation and govern and control the future conduct and action of the authorities. In other words, Sections 5 and 6 have no force and effect until after the bonds have been issued. The officers cannot act under their provisions until after the provisions of the first four sections have been substantially complied with and the bonds issued;

after that the first four sections no longer have any force and effect, but Sections 5 and 6 control. When the inquiry is as to whether the bonds should issue or have been properly issued, we look alone to the provisions of Sections 1, 2, 3 and 4 to ascertain if their provisions have been substantially complied with; but when the inquiry is not as to whether the bonds were properly issued, but as to how they shall be paid, then we look to Sections 5 and 6. By giving to the act in question the foregoing interpretation, its several sections and provisions harmonize each with the other, and such harmony can not be attained in any other way.

Can it be that the Legislature intended that the principal of the debt should be paid long before the interest? Certainly not; and yet such would be the case if the rate of tax to pay the interest cannot exceed the limitation mentioned in the proposition, for it is made the duty of the proper officers to commence after the year 1880 to levy an annual tax to pay the principal when it becomes due. There can be no limitation in the proposition as to the rate of tax for such purpose (as the law makes no provision for the proposition to contain more than a provision for the interest tax), and these bonds coming due in twenty years after their date, will be due and payable long before the interest can be paid by a one mill tax.

The case of United States vs. Macon County, 99 U. S. 582, cited by defendants' counsel, has no application, for in that case there was an express limitation in the law under which the bonds were issued as to the amount of the levy, while the law under which the bonds in this case were issued requires the levy to be SUFFICIENT to pay the annual interest.

The Supreme Court of this State, in the case of The State vs. Dodge County, 10 Neb., on page 23, speaking with reference to the payment of these same bonds, say they are "to be paid by means of a special tax levied and collected on the taxable property therein AS PROVIDED IN CHAPTER 35, GENERAL STATUTES 448; when such bonds are issued conformably to the requirements of this chapter, the mode of their payment is simple and plainly pointed out. To that end no judgment at law on the bonds or on the interest coupons as they fall due is contemplated or at all necessary, for it is made the duty of the Commissioners of the proper county—the one in which the precinct voting the bonds is—to levy and cause to be 'collected and paid to the holders of such bonds a special tax on all the taxable property' within the precinct SUFFICIENT to pay the interest as it becomes due and finally the bonds themselves at their maturity. In case of a failure or refusal of the commissioners to perform this duty it is provided that they may be compelled by mandamus to do so."

Here we have the decision of the highest court of this State, holding that the tax to be levied to pay the bonds in question is that provided by Chapter 35, General Statutes 448, (which is the internal improvement act of Feb. 15th, 1869) and that the tax must be sufficient in amount to pay the interest as it matures.

But why discuss this question further; the bonds in question have been decided valid by repeated adjudications as we have seen. This Court has said relator was entitled to judgment notwithstanding the terms of the proposition. Will it now say your judgments shall not be enforced? That relator is entitled to the shadow but not the substance of judicial relief.

RECAPITULATION.

I.

The bonds in question have been adjudged valid obligations by the Supreme Court of the State, as well as by this Court.

Fremont Building Association vs. Shervin, 6 Neb. 48.

County Commissioners vs. Chandler, 6 Otto 205.

II.

The terms and conditions of the proposition upon which the electors voted only govern in determining as to whether the bonds have heen properly issued, and have no effect or bearing upon the question as to the power of taxation for the payment of valid bonds.

III.

The relator basing his claim upon judgments rendered by the Circuit Court, such judgments are conclusive as to the regularity and validity of the bonds, and the Court in this action will not inquire as to the sufficiency of the original cause of action.

Mayor vs. Lord, 9 Wall. 409.

IV.

The law under which the bonds were issued formed the contract between the corporation and relator, and payment must be made according to the terms of such law.

Von Hoffman vs. City of Quincy, 4 Wall. 535.

V.

That Chapter 9, of the Revised Statutes of 1866 (being Chapter 13, General Statutes, 1873) has no application to the bonds and case in question.

Fremont Building Association vs. Shervin, 6 Neb. 53.

VI.

The bonds recite that they are issued under the provisions of the act of Feb. 15th, 1869, and the municipality is concluded by such recital.

VII.

The act of Feb. 15th, 1869, under which the bonds were issued, provides that the commissioners shall annually levy a tax SUFFICIENT to pay the interest on the bonds. The commissioners having failed and refused to levy a sufficient tax (the levy being one mill upon a valuation of less than $1,000,000) relator is entitled to a peremptory writ of Mandamus as prayed.

WM. H. MUNGER,
Attorney for Relator, Plaintiff in Error

110-158

In the Supreme Court of the United States.

No.

UNITED STATES, EX. REL., GEORGE B. CHANDLER,

vs.

THE COUNTY OF DODGE.

Brief of J. T. NEWTON,
LEWIS A. GROFF,
C. S. MONTGOMERY.

SAMUEL REES, Printer and Blank Book Maker, Omaha, Neb.

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C. S. MONTGOMERY.

This is a writ of error to the Circuit Court of the United States for the District of Nebraska.

Having several judgments in the Circuit Court for the District of Nebraska, founded upon bonds of the same issue as those which are the basis of the judgments on which the foregoing proceeding was brought, we are permitted by Mr. Munger, counsel for plaintiff in error, to submit the following suggestions:

ASSIGNMENT OF ERRORS.

It is claimed in this case that the Circuit Court erred:

1. In overruling the demurrer of relator to the defendant's answer to the alternative writ.

2. In not granting a peremptory writ of mandamus to compel a levy of tax sufficient to pay the judgments of the relator as prayed for.

ARGUMENT.

The question, therefore, presented in this proceeding involves an inquiry into the authority, and the legal liability of the County Commissioners of Dodge County, to cause to be levied a tax upon the property of Fremont Precinct, in that County, sufficient to meet the accrued and current interest upon an issue of fifty thousand dollars of internal improvement bonds. Questions growing out of the issue of these bonds, and the validity of them, have been twice before this Court, and disposed of in *County Commissioners vs. Chandler*, 96 U. S. R., 205, and *Davenport vs. County of Dodge*, 105 U. S. R., 257.

So also the same questions came before and were disposed of by the Supreme Court of Nebraska, in the case of *Fremont Building Association vs. Sherwin*, 6 Nebraska, 48.

All these cases hold that the bonds were lawfully issued, and were valid securities in the hands of the holders.

In issuing these bonds on behalf of the Precinct, the County Commissioners, among other things, set forth and recite upon the face of them the facts following, to-wit: "That the Smith Bridge Company has contracted with the Commissioners to furnish the material for, and to construct a bridge over the

Platte River," and that in pursuance of the same, as well as, "under provisions of an act of the legislature of the State of Nebraska, approved Feb. 15, A. D., 1869, entitled etc.," the bond is issued.

And the Commissioners further set forth that *the bond is one of a series issued in pursuance of, and in accordance with a vote of the electors of said Fremont Precinct, at a special election held, etc.*

It is admitted that the Commissioners have, since the issue of said bonds, caused to be levied annually upon the property of the Precinct, a tax of one mill on the assessed valuation of the same, and the position is taken in answer to this proceeding, that the Commissioners discharge their whole duty in levying such a tax.

The bonds having been lawfully issued as adjudged by the Supreme Court of the United States, and the Supreme Court of Nebraska, it must be conceded that they evidence a valid and legal debt, one to be paid, both principal and interest, according to the tenor of the bond and coupons attached, and by a levy of taxes, if necessary, unless the authorities having control of such levy, are in some manner restrained by law from making the levy.

Loan Association vs. Topeka, 20 Wallace, 660.
United States vs. County of Macon, 99 U. S. R., 582.
Ralls County Court vs. United States, 105 U. S. R., 733.
United States vs. New Orleans, 98 U. S. R., 381.

It rests, therefore, upon the Commissioners to show such limitation upon the taxing power, and according to the

adjudications upon this question, the limitation, must, to bind the holder of bonds, be imposed either by the act authorizing the issue of the bonds, or by some general statute in force at the time limiting the levy of taxes.

In *Loan Company vs. Topeka*, the Court makes use of this language. "*It is, therefore, to be inferred that when the legislature of the State authorizes a County or City to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or some general statute, a limitation upon the power of taxation, which repels such inference.*"

Also in *Ralls County Court vs. United States*, the Chief Justice of the Court lays down the proposition as follows:

"*It must be considered as settled in this Court that when authority is granted by the legislative branch of the government to a municipality, or a subdivision of a State, to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet at maturity the obligation to be incurred is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention.*"

Wherein have the County Commissioners pointed out in their answer to the application made in this proceeding, any law restricting them to a levy of one mill? We have failed to discover in any law of the State a limitation upon the power to raise by taxation sufficient to pay the current interest and the principal of these bonds.

On behalf of the Commissioners, counsel claim that they are excused from making the levy demanded, because:

1. The voters authorizing the issue of the bonds acted upon a proposition providing for a mill tax, and no more.

2. That Sections 23 of Chapter 9, Revised Statutes of 1866, limits the annual tax for bridge purposes to one mill.

The bonds in question were not issued under any statute in existence prior to that of 1869, and they were issued in fact under the law of 1869, as recited upon the face of the bonds, and the amendment thereto passed in 1870, not referred to in the bonds.

In passing upon the legality of the bonds in question, the Supreme Courts of the United States, and of the State of Nebraska, have distinctly defined the character of them, and have classified them under the statute law of the State. These Courts have decided that a bridge over the Platte River is a work of internal improvement. That it was lawful in the Commissioners to aid such a work by issuing bonds, binding a Precinct, and that these bonds are of that character.

Union Pacific R. R. Co., vs. Colfax County, 4 Neb., 459.

And not issued under the act of 1866—

Fremont Building Association vs. Sherwin, 6 Neb., 48.
County Commissioners vs. Chandler, 96 U. S. R., 205.

If then these bonds were issued under the law of 1869, and are in fact what upon their face they purport to be, it appears to us that we need not resort to previous laws to ascertain what rights the holders have. The law of 1869, and the

amendment to it, govern us, inasmuch as under them the bonds were authorized and issued.

Under the law of 1869, the Commissioners were authorized to issue bonds of the class in question, and when issued, Section 4 of the statute, provided that such bonds should be and continue a subsisting debt, until paid, and Section 5 of the same statute, provides that the proper officers shall levy a special tax sufficient to pay the annual interest on the bonds, and finally to pay the principal.

So far from there being any limitation upon the tax levy in the act under which these bonds were issued, the provision is imperative that *the officers shall levy a tax sufficient to meet the interest and pay the principal.*

And the proposition submitted to, and acted upon by the voters, provided that, for the purpose of raising a *sinking fund* to pay the principal, interest, repairs of bridge and contingent expenses, the bridge should be a toll bridge, and if the tolls should prove insufficient, then a tax of one mill should be levied annually in addition to the *usual taxes.*

By usual taxes, we suppose was meant other taxes which by law the authorities were authorized to levy for general purposes, and including taxes for bridges.

As bearing upon the supposed action of the voters, counsel representing the Commissioners, takes exceptions to it, in that it does not appear that the voters accompanied the proposition to issue the bonds with a provision to levy a sufficient tax to

pay the interest and the principal, and claims that in fact they have limited the levy to the tax of one mill.

To which we reply that the voters voted the issue of the bonds and the Commissioners in pursuance of the vote, caused the bonds to be put in circulation, and it is too late for the taxpayers and authorities to claim an advantage growing out of any supposed failure of the voters to provide for the levying of a sufficient tax.

Whether in fact, the voters did, or did not, pass upon the question of levying a sufficient tax is not apparent. It is certain that they did vote to issue the bonds, and asserted in the proposition acted upon, *that the interest should be paid annually.*

In authorizing the issue, and declaring that the interest should be paid, we claim that the voters substantially acted upon a proposition to levy the required tax, in addition to the sinking fund provided for.

The objections of counsel to this omission, if any, on the part of the voters, if it amounts to anything, goes to the validity of the bond, and not to the amount of the tax.

But in view of the judgments upon which this proceeding is based, and the numerous decisions holding the bonds to be valid, that question ought to be at rest.

The Circuit Court of the United States for the District of Nebraska, in passing upon the validity of certain bridge bonds issued by County Commissioners under a statute of the State, which provided that to legalize the issue of such bonds the question should be submitted to a vote, held, that when the

bonds had been issued to build and had been applied to the building of bridges, they were valid in the hands of an innocent purchaser, although the issue of them had not been authorized by any vote.

Lewis vs. County Commissioners, 1 McCrary, 377.
Same, 2 McCrary, 464.

The recital on the bond was that they had been authorized by a vote of the people.

If then such a bond be valid, without any vote whatever in fact, so much the more should a bond be treated as valid when it is conceded the issue was voted, and the objection is simply that the voters omitted to pass upon the levy of a sufficient tax.

Conceding as claimed that the only tax passed upon by the voters was the one mill tax, and that they undertook to limit the tax to that levy, what then?

It can hardly be claimed that the voters could by their action annul the provisions of the statute, and confine the levy to one mill, when the statute provides that the authorities shall levy a *special tax*, sufficient to pay the annual interest and principal.

But it does not seem to us that the voters have in any manner undertaken to limit the levy of taxes, or have undertaken to annul or set aside the statute.

The proposition submitted, provides for a *sinking fund*, and this, without any limitation upon the taxing power, that is,

without regard to a levy upon the property of the Precinct, to pay the current interest and principal.

We claim that the case is brought within the rule laid down in *United States vs. County of Clark*, 96 U. S. R., 211.

And the doctrine of which is approved in *United States vs. Macon*, 99 U. S. R., 582.

United States vs. County of Knox, 2 McCrary, 625.

So far as the action of the voters is concerned, it does not appear that they undertook to limit payment of the bonds to the mill levy, or that the authorities in issuing the bonds sought to limit the payment of them to that levy.

United States vs. Macon, supra.

Still further, if as claimed, the voters failed to comply with the statute, and omitted to accompany the proposition to issue the bonds with a provision to levy a sufficient tax to meet the interest and principal, such failure and omission, it seems to us, does not bear upon the questions before the court.

The section of the statute providing for the vote on the tax is simply directory, and is not a condition precedent to the issue of the bonds.

The act found in the Revised Statutes of 1866, touching the borrowing of money for bridge and other purposes, and the issuing of bonds therefor, provides that the vote shall be invalid, if the tax is not voted. No such clause is found in the act of 1869, under which these bonds were issued. The omission in the later act is quite significant, and shows that the failure, if any such existed, to vote the sufficient tax in no

manner affects the validity of the bonds, or limits the power of taxation.

But, if we understand this case, and the rules of law applicable thereto, the question as to what the voters omitted to do, and what they did in fact do touching the matter of taxation, does not in any manner concern the bond holders.

The purchasers of the bonds had a right to rely upon the recital of facts found upon the bonds, and were not required to go behind them.

Upon the face of them there are certain recitals of fact set forth by the Commissioners, and among other things they say that the bonds are issued *in pursuance of and in accordance* with a vote of the electors of the Precinct at a special election, etc.

And that they are issued in pursuance of a contract made to erect a bridge over the Platte River, and under the provisions of an act of the legislature approved Feb. 15, 1869.

What do these recitals indicate, and what do they in fact declare?

They make known to the purchasers of the bonds:

1. That the issue of the bonds was authorized by the voters of the Precinct, and that the same was approved by them.

2. That the requirements of the statute under which the bonds were issued were fully complied with.

And in short the declarations of the Commissioners are, that the bonds are what upon their face they purport to be.

Recitals in bonds that they are issued in pursuance of a vote of electors and of the statute authorizing their issue, are suffi-

cient and conclusive upon the authorities issuing the same, and tax-payers.

County of Clay vs. Society for Savings, 104 U. S. R., 579.
Bonham vs. Needles, 103 U. S. R., 648.
Insurance Company vs. Bruce, 105 U. S. R., 328.
Knox County vs. Aspinwall, 21 How., 539.
Buchanan vs. Litchfield, 102 U. S. R., 278.
Pana vs. Bowler, 107 U. S. R., 529.

A bona-fide holder of bonds is not bound to look beyond the legislative act authorizing the issue of the same, or behind the recitals in the bonds.

Knox County vs. Aspinwall, 21 How., 539.
Walnut vs. Wade, 103 U. S. R., 683.
Town of Coloma vs. Earel, 92 U. S. R., 484.
Marcy vs. Town of Oswego, Same, 637.
Commissioners of Douglas Co., vs. Bolles, 94 U. S. R., 104.

Coming to the particular recitals of fact upon the face of the bonds in question, our position is, that a construction has been given to the statute under which the bonds were issued, by the Supreme Court of Nebraska.

And that Court says most distinctly, that the recitals of fact on the face of these bonds, gave the Commissioners ample authority to issue them. That in every formal requisite the bond is faultless, and that it appears upon the face of the bonds that there was a full compliance with the requirements of the statute, under which the bonds were issued.

Fremont Building Association vs. Sherwin, 6 Neb., 48.

In so deciding, the State Court gave a construction to the provisions of a local law of the State, and to that extent we suppose this Court will follow the opinion of the State Court.

From the foregoing it will be seen that our position upon the application made in this action is covered by the propositions following:

1. The recovery of the judgments and the adjudications of the Courts establish beyond question, the legality of the bonds.

2. If the debt be valid, the same must be paid in the ordinary manner, unless the authorities charged with its payment are restrained by some limitation imposed upon the power of taxation in the statute under which the debt was contracted, or by some general law in force at that time.

3. The purchaser of the bonds had a right to rely upon the recitals on the face of them, and if the issue was authorized by law, and the recitals imported that such law had been complied with, such purchaser was not bound to examine further.

4. The recitals substantially affirm that the bonds were issued with the approval of the voters, and in pursuance of a law which provided for their issue.

5. Upon the supposition that the voters did not pass upon the question of a sufficient tax to pay the interest and principal of the bonds, they did in fact authorize the Commissioners to place the bonds on the market, and the Commissioners and tax-payers are thereby estopped from alleging any limitation upon the power of taxation to pay them, in the face of a statute which imposes upon the proper authorities the duty to levy a *special tax* sufficient to pay the annual interest and the principal of the bonds.

6. The objection that the voters did not pass upon the matter of a sufficient tax, at most only goes to the question as to the validity of the bonds, and not to the amount of the tax that may by law be levied to pay them.

Something might be said as to the injustice done the bondholders, if the defense interposed to this application is successful. But, it is hardly worth while to follow the example of counsel representing the Commissioners and tax-payers, and comment upon matters outside of the record.

It is claimed that it would be a hardship for the Precinct to pay the bonds.

It would be somewhat severe for the bondholders to lose one half or more of the face value of their securities. Having fairly contracted the debt, it is but justice that it be fully paid.

J. T. NEWTON.
LEWIS A. GROFF.
CARROLL S. MONTGOMERY.

110-156

IN THE

Supreme Court of the United States,

October Term 1883.

NO.....

United States Ex. Rel. George B. Chandler,

Plaintiff in Error.

VS.

The County of Dodge,

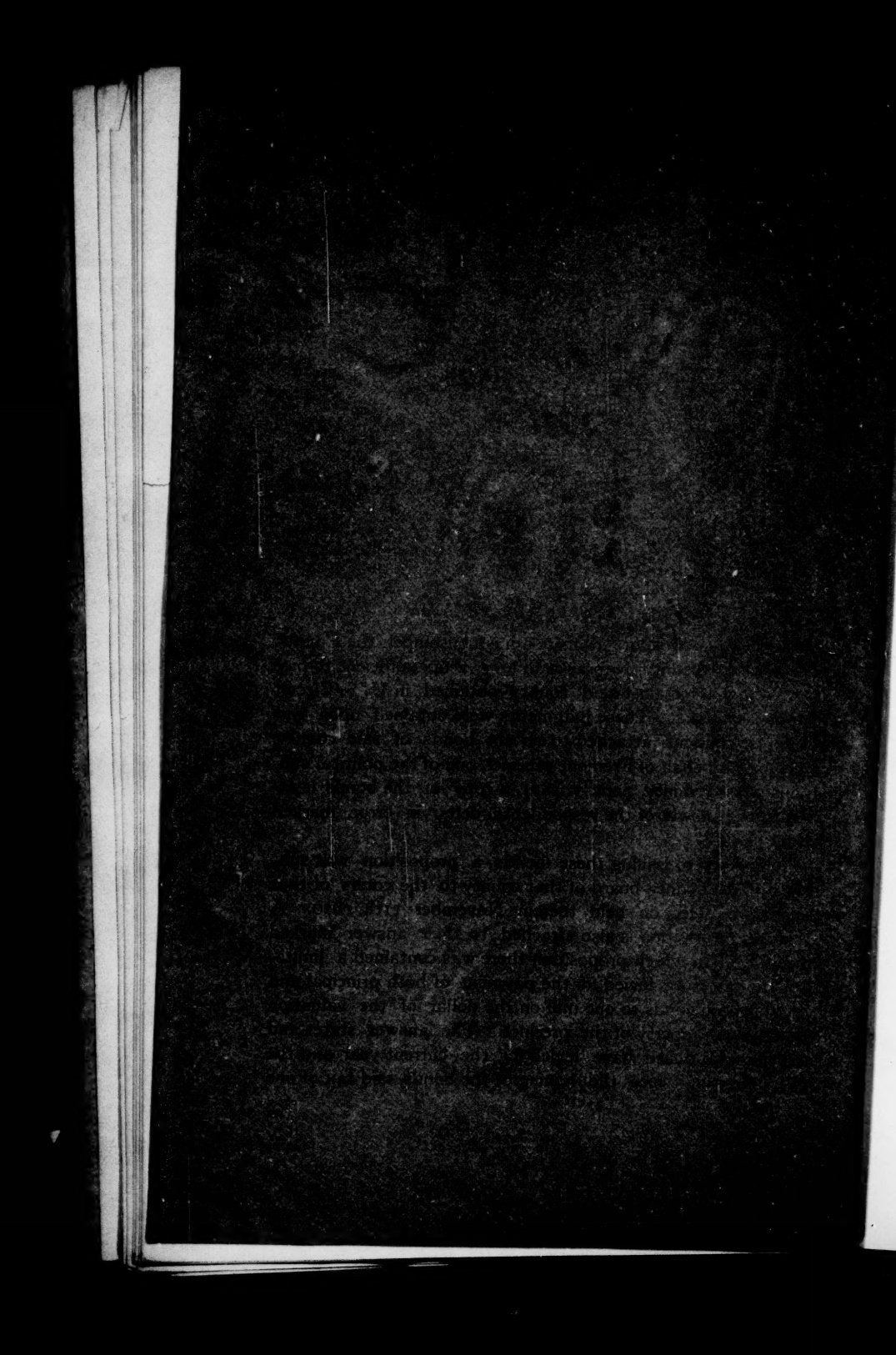
Defendant in Error.

Brief and Argument of Def't. in Error.

WILLIAM MARSHALL,

Attorney for Def't in Error.

Fremont Tribune Steam Book and Job Printing House.
1883.



In the Supreme Court of the United States

U. S. Ex Rel. George B. Chandler, Plaintiff in Error

vs.

Henry J. Lee, et al, Board of Commissioners of Dodge County, Defts. in Error.

GENERAL STATEMENT OF THE CASE.

This is an application for mandamus to compel the County Board of Dodge county, Nebraska to levy a tax sufficient to pay certain judgments against said county obtained in U. S. Circuit Court for Nebraska. These judgments were obtained upon certain interest coupons attached to certain bonds of said county, issued by it on behalf of Fremont precinct, one of the political subdivisions of said county, Sept. 1, 1871, a copy of the bonds is attached to the answer of the respondents, defts. in error, marked "Exhibit A."

Preliminary to issuing these bonds a proposition was submitted by the county board of that county to the voters of that precinct at an election held therein November 11th, 1870. A copy of this proposition is also attached to their answer marked "Exhibit B." In which proposition there was contained a limitation of the tax to be levied for the payment of both principal and interest of these bonds to one mill on the dollar of the valuation of the taxable property of the precinct. The answer states and alleges that the Board have levied for the current year and the years preceeding since the issuing of the bonds, said tax of one

mill on the dollar. That they have no funds wherewith to pay these judgments &c.

To this answer the relator demurred. The court overruled the demurrer and refused to grant a peremptory writ. The question now before the court is, did the court err in so ruling?

On the part of the relator it is claimed that the statute under which these bonds purport to he issued requires a levy of a tax sufficient to pay these judgments. On the other hand the respondents claim that under the limitation in the proposition voted for, and the statute as it then existed the tax should be limited to a levy of one mill on the dollar.

About the facts there is no dispute. It is conceded that the county Board have made this one mill levy and if the law does not require the levy of a greater amount then the court below did right in overruling the demurrer and denying the writ of peremptory mandamus. It is further conceded by the counsel for the relator in his brief,"That the bonds and the statute under which they were issued constitute the contract."

The principal questions for determination are these. What effect in law is to be given to the limitation of the one mill levy contained in the proposition and how does it effect an innocent holder of these bonds? Again,did the law in force at the time of the voting and issuing of these bonds limit the levy of a tax for their payment to one mill on the dollar? In short, are the county commissioners under the proposition voted for, the bonds as they stand, the law of the state of Nebraska as it existed at the time of their issue, required to levy a tax greater than one mill on the dollar of the valuation of the property of said precinct?

The third division of the proposition is as follows:

"III. It is proposed that for the purpose of raising a sinking fund to pay the principal, interest, repairs and contingent expenses the said bridge shall be a toll bridge, the rates of toll to be fixed and regulated from time to time by said county commissioners, and collected in pursuance of their order and such tolls shall not be used for other purposes than those above mentioned, and if said tolls collected shall not at any time be insufficient to pay the

interest as the same shall become due on said bonds, and keep up necessary repairs and contingent expenses, and also create a sinking fund to pay the principal of said bonds as the same shall mature, then the said county commissioners shall make a levy upon the taxable property of said Fremont precinct for that purpose and continue from year to year until the said bonds are paid, and cause the same to be collected, provided, that in any one year such levy shall not exceed one mill on the dollar of the valuation of the taxable property of said precinct."

The recitations in the bond are as follows:

"This bond is one of a series issued in pursuance of and in accordance with a vote of the electors of said Fremont precinct at a special election held on the eleventh day of November, 1870 at which time the following proposition was submitted: Shall the county commissioners of Dodge county, Nebraska, issue their special bonds on Fremont precinct, in said county, to the amount not to exceed fifty thousand dollars, to be expended and appropriated by the county commissioners, or as much thereof as is necessary in building a wagon bridge across the Platte river, in said precinct, said bonds to be made payable on or before twenty years after date bearing interest at the rate of ten per cent per annum, payable annually? Which was duly elected, adopted and accepted by a majority of the electors of said precinct voting in favor of ihe proposition.

"And whereas the Smith Bridge Company of Toledo, Ohio, have entered into a contract with said county commissioners to furnish the neccessary materials, and to build and construct said bridge referred to in the foregoing proposition."

"Wherefore this bond with others is issued *in pursuance thereof*, as well as under the provisions of an act of the legislature of the state of Nebraska, approved February 15, 1869 &c.

The act of the legislature referred to in the above recital so far as it relates to the present controversy is as follows: (See General Statutes of Nebraska, 1873, page 448.)

"Sec. 1. That any county or city in the state of Nebraska is hereby authorized to issue bonds to aid in the construction of

any railroad or other work of internal improvement to an amount to be determined by the county commissioners of such county or the city council of such city, not exceeding ten per cent of the assessed valuation of all taxable property in said county or city. Provided the county commissioners or city council shall first submit the question of the issuing of such bonds to a vote of the legal voters of said county or city, in the manner provided by chapter nine of the revised statutes of the state of Nebraska, for submiting to the people of a county the question of borrowing money.

"Sec. 2. The proposition of the question must be accompanied by a provision to levy a tax annually for the payment of the interest on said bonds as the same becomes due. Provided that an additional amount shall be levied and collected to pay the principal of said bonds when it shall become due, and provided further that no tax shall be levied or collected to pay the principal of said bonds until the year 1880."

"Sec. 3. The proposition shall state the rate of interest such bonds shall draw and when the principal and interest shall be made payable."

"Sec, 4. Upon a majority of the votes cast being in favor of the proposition submitted, the county commissioners, in the case of a county and the city council in the case of a city shall cause the proposition and the result of the vote to be entered upon the records of said county or city, and a notice of its adoption to be published for two successive weeks in any newspaper in said county or city, if there be one, and if not, then without such publication, and shall thereupon issue said bonds which shall be and continue a subsisting debt against such county or city, until they are paid and discharged.

"Sec. 5. It shall be the duty of the proper officers of such county or city to cause to be annually levied, collected and paid to the holders of such bonds a special tax on all taxable property within said county or city, sufficient to pay the annual interest as the same becomes due, and when the principal of said bonds becomes due such officers shall in like manner collect an additional amount sufficient to pay the same as it becomes due."

* * * *

"Sec. 7. Any precinct in any organized county of this state, shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties * * and the county commissioners shall issue special bonds for such precinct and the tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, but shall contain a statement showing the special nature of such bonds."

So much of chapter nine of the revised statutes referred to in section one (1) above as relates to this controversy is as follows:

(See revised statutes of Nebraska, 1866, pages 40–41.)

"Sec. 19. The said commissioners shall have power to submit to the people of the county at any regular or special election the question whether the county will borrow money to aid in the construction of public buildings, the question whether the county will aid or construct any road or *bridge*, or to submit to the people of the county any question involving an extraordinary outlay of money by the county and said commissioners may aid any enterprise designed for the benefit of the county as aforesaid whenever the majority of the people thereof shall be in favor of the proposition, as provided in this section."

"Sec. 20. When county warrants are at a depreciated value, the said commissioners may in like manner submit the question whether a tax of a higher rate than that provided by law shall be levied; and in all cases when an additional tax is levied in pursuance of the vote of the people of the county, for the special purpose of repaying borrowed money or of constructing or ordaining to construct any road or bridge or for aiding in any enterprise contemplated by the preceeding section such special tax shall be paid in money and in no other manner.

"Sec. 21. The mode of submitting questions to the people, contemplated by the last two sections shall be the following: The whole question including the sum desired to be raised, or the amount of the tax desired to be levied, or the rate per annum, and the whole regulation including the time of its taking effect, or having

operation, if it be of a nature to be set forth, and the penalty of its violation if there be one, is to be published at least four weeks in some newspaper published in the county. If there is no such newspaper published the publication is to be made by posting up in at least one of the most public places in each election precinct in the county, and in all cases the notices shall name the time when such questions shall be voted upon and the form in which the question shall be taken, and a copy of the question submitted shall be posted up at each place of voting during the day of election.

"Sec. 22. When the question submitted involves the borrowing or expenditure of money, the proposition of the question must be accompanied by a provision to levy a tax for the payment thereof in addition to the usual taxes under section sixteen of this chapter, and no vote adopting the question proposed shall be valid unless it likewise adopt the amount of tax to be levied to meet the liability incurred.

"Sec. 23. The rate of tax to be levied in pursuance of the last four sections of this chapter shall in no case exceed three mills on the dollar of the county valuation in any one year. When the object is to borrow money to aid in the erection of county buildings, the tax shall be such as to pay the debt in ten years; when the object is to construct or aid in *constructing any road or bridge*; the *annual rate* shall not *exceed one mill on the dollar* of the valuation, and any special tax or taxes levied in pursuance of this chapter becoming delinquent shall draw the same rate of interest as ordinary taxes levied in pursuance of the revised law of this territory.

The first recited act we will denominate and call the act of 1869. Chapter nine (9) of the revised statutes we will call the act of 1866.

1st. It will be noticed that the bonds recite a proposition as having been voted for, as the foundation for their issue; that no proposition as required by section 2 of the act of 1869, accompanies itto authorize the levy of a tax to pay the interest on those bonds, and that they are issued for the construction of a bridge.

2d. That the proposition voted for limits the tax to be

levied for the payment of both principal and interest of these bonds in any one year to one mill on the dollar of the valuation of the property in the precinct.

3d. That in the act of 1869 bridges are in it nowhere mentioned and that it is only by judicial construction that its general terms relating to internal improvements are made to include them.

4th. That section 19 of the act of 1866 expressly names the construction of bridges as one of the objects for which the county may borrow money to build bridges.

5th. That section 23 of the act of 1866 expressly provides that "when the object is to construct or aid in the construction of any road or bridge the annual rate" of tax "shall not exceed one mill on the dollar" of the valuation.

In the view we take of the law of this case applied to the facts thereof three propositions invite our consideration.

First. Do the recitations on the face of the bonds preclude or estop the defendants from setting up in this action the one mill limitation, contained in the proposition actually voted for and is the payment of these judgments restricted to a levy of that amount?

Second. Are these recitations such as to put the purchaser thereof upon enquiry as to the facts appearing upon the face of the records of the defendant board, as to this one mill limitation?

Third. Did the law in force at the time of their issue limit the levy of a tax to a rate not exceeding one mill on the dollar.

I.

First. Do the recitations on the face of the bonds, preclude or estop the defendants from setting up in this action the one mill limitation of the tax?

In the bond there is a specific recital of a particular proposition entire and complete in itself. There is no intimation that it is a fragment or part of the proposition, but it purports to be the whole proposition voted for. It is not "accompanied with a provision to levy a tax annually for the payment of the interest on said bonds as it becomes due" as required by the second section

of the act of 1869 and in that regard it fails to comply with the statute. This provision is a proviso or condition attached to the proposition and this statutory requirement is certainly mandatory and must be pursued. It is intended to advise the voter that if he votes the bonds he must keep the interest paid up, and that he cannot shift this burden on the future. Here is a want of compliance apparent upon the face of the bonds as to this specific requirement. It may be contended that the general recital contained in these bonds, recites that they were issued under this statute is equivalent to stating that they were issued "in compliance with or in pursuance of" the statute. It such had been the meaning intended to have been attached to the word "*under*" the bond would have so stated, but as the bond states that it was issued "in compliance with and in pursuance of" the vote upon the recited proposition; can it be inferred that they have used the word "*under*" to express the same meaning? Is it not fair to presume that as a different word has been used a different meaning was intended? This, we think is clear because the word "under" is not synonymous with "in compliance with," or "in pursuance of." We have been unable to find any authority giving it that signification. "Wherefore this bond, with others, is issuud *in pursuance thereof*, as well as under" the statute. If it had been intended to be used in the sense of "in pursuance of," the bond would read, "wherefore this bond with others is issued in pursuance thereof as well as in pursuance of" the statute." Had this been the intention of the defendant in making the bond, it would have been so expressed. They evidently intended by the expression "as well as under" the statute to be understood merely to refer to the statute as the source of its power to issue the bonds—in other words to give the statutory authority for their issue. The word "under" very properly expresses that idea, and in fact expresses no other when taken in connection with the specific recital of the proposition which precedes it.

Let us suppose that the expression "as well as under the statute" means that there was a general compliance with the statute in issuing these bonds. Then it would follow that the special recitation of the proposition would be mere surplusage, having no force or effect whatever, for if the accompanying provision can be

supplied by this general recitatation so might the whole proposition. But force and effect must be given to all the terms and provisions of a contract. "All the parts of the contract will be construed in such a way as to give *force and validity to all* of them and *to all of the language used*." 2 Pars. Contracts 504—506. Even if such were the natural import of the word such construction cannot be given to it and effect be given to the specific recitation.

What we claim is this, that the bonds having recited the proposition voted for and that such proposition as recited shows upon its face a failure to comply with the conditions and terms of the statute, in regard to the accompanying condition or provision then a general recital of compliance therein should not be held to have been intended by the obligor thereof to add to or change the proposition thus recited, or to supply to such proposition any thing necessary to show its compliance with the statutory conditions touching this accompanying provision; nor should the purchaser thereof, from such general recital be authorized to infer or presume such intention. In other words, what we claim is this that the bond having recited the proposition voted for, which if in any way defective, such defect cannot be held to be supplied by a general recital. Says Spencer Justice: "But when there is a particular recital in a deed: and then general words follow, the general words shall be qualified by the particular recital." Stevens vs. Jackson 16, Johnson 114 and 115. Under a statute providing "that no tradesman, artificer workman or other person" should exercise his ordinary calling on the Lords day, the words "other person" were held not to include a farmer, for as Bailey Justice said if all persons were meant, there was no need of a specific enumeration. Reg. vs Whitnash 7 B. & C. 596. So in this case the general recital cannot be held to enlarge the proposition recited, for if it can, there is no use in making the specific recital at all. This will be discussed more fully hereafter in this argument and brief.

When a specific recitation is made in a contract or obligation, is it not presumed that the maker of the contract has recited all that he intended to bind himself by as to that particular matter?

When the defendant in these bonds recited in the bond what purports to be the proposition voted for, can it be presumed, that by a general recitation even, of compliance with the statute the proposition thus recited was to be enlarged or added to in any way? Is it not the rule that when a party has made a specific recitation, the specific recitation covers all that he intended to recite on the subject to which such specific recitation relates? We have been unable to find any cases passing on this point as to municipal bonds. We have however found authorities covering the principle involved in this question. A man executes a mortgage upon real estate to which is attached many fixtures. If there was no enumeration or recitation of the fixtures in the mortgage deed, all would pass to the mortgagee as security, by virtue of the general language of the mortgage of the premises to which they were attached, and the mortgagor would be estopped from denying that such was the legal effect of his mortgage when expressed in general terms. But if the mortgagor has specifically recited in the mortgage the fixtures, none pass except those enumerated, upon the principal of *expressio unius est exclusio alterius.* 1 Jones Real Estate Motgs. § 430. Trappes vs. Harter. 2 Crompton & Meeson 153, 177. Hare vs. Horton, 5 Barnwall and Adolphus 715. "When the words of the condition of a bond are general and indefinite as to the time during which the surety shall remain liable, if there is a recital in the bond, specifying the time during which the prescribed duty is to be performed by the principal, the *general words will be limited by the recital* and the surity will only be liable for the time therein specified."

Brandts Guaranty & Suertyship § 138, and cases cited.

Plaintiffs counsel contends that the provision which must accompany the proposition as specified in section 2 of the act of 1869 forms no part of the proposition, That it only accompanies it. Webster defines "accompany" thus "To go with or attend as a companion or associate," and his 4th definition of "provision," which is really the only one that applies to this subject, thus, "That which is stipulated in advance, a condition, a previous agreement, a proviso, as the provisions of a contract." It accompanies the proposition as a companion or associate, the same as a proviso

or condition does a statute or contract and must necessarily be a part of the proposition. But this provision is a stipulation in advance, an agreement or proviso by which the voter consents to, and authorizes the levy of the tax to pay the annual interest. Sec. 5 of the act requires a levy sufficient to pay the interest, but this necessarily assumes that Sec. 2 has been complied with, that the provision for the levy has accompanied the proposition and that the voter by voting for the proposition containing this provision has consented to, and authorized, the levy for that purpose. The legislature has authorized the issue of bonds; has prescribed certain terms and conditions to be observed and followed in so issuing them, among others the provision giving consent for the levy of the annual interest tax, these all precede Sec. 5. This section then, on the theory that these conditions have been complied with that the consent of the voters to make the levy has been obtained, requires the annual levy sufficient for this purpose. But it does not require a levy of that amount when the consent thereto has not been obtained. It does not require a levy of that amount when this condition precedent has not been complied with, but only in those cases wherein it has been complied with and the voter has in advance agreed to the levy. It does not apply to a case where the voters have limited the levy to a certain amount, and when there is nothing on the face of the bonds to preclude or estop the municipality from showing such limitation.

This proviso or provision is a condition precedent to the right to make the levy. It is evidently inserted in the statute for the purpose of obtaining the consent of the voter to the taxation required to pay the interest on the bonds. If this is not its purpose and office, then what is it? The language of Sec. 2, of the act of 1869 is: "The proposition *must* be accompanied by a *provision* to levy a tax annually for the payment of the interest on said bonds as it becomes due." While we concede to the plaintiff the right to produce the record of the defendant board and thereby show that such a provision did accompany the proposition, and thus sustain the validity of the bonds: yet we insist that as the specific recital cuts off all application of the general recital, to the matter or the substance of the proposition, and its necessary attendant condition

or provision, the defendant has also the right to resort to the same record to show what the actual proposition and provision voted for contained. The specific recital of the proposition, cuts off the general recital from all force, effect or power to supply presumptive evidence of this necessary condition or provision, accompanying the recited proposition. The proposition recited must be taken, either as the whole entire propositon voted for, or else that the purchaser of the bonds must look elsewhere for proof to supply this condition or provision, and this he does by producing the record. In that record it appears that the proposition voted for was in point of fact accompanied by a provision to levy a tax for the payment of this interest. It is then the record, and not any recitation upon the face of the bonds, that binds the defendant corporation to make a levy at all. But this record shows that the rate of levy of such tax is limited to one mill on the dollar. The voters and the municipality have not consented to any greater levy. The statutory right to make the levy is evidently based on such consent. The extent of the levy must therefore be limited to the terms of such consent, and cannot exceed the amount of such limitation.

The answer of the defendants, so far as it relies upon the limitation contained in the proposition actually voted for, presented a good defense in this action, as the one mill levy had already been made. The demurrer was properly overruled, and the premptory writ properly denied.

II.

Are these recitations in the bonds,, such as to put the purchaser thereof, upon enquiring as to the facts appearing upon the face of the record of the proceedings of the defendant board, as to this one mill limitation?

We think that we have satisfactorily shown that the 2d section of the act of 1869, requires the proposition of the question in this class of cases to be accompanied by a condition or promise, authorizing the levy of a tax to pay the annual interest accruing upon these bonds: if the proportion recited is to be taken as the exclusive evidence of the only proposition submitted then the

bonds are futally defective; that the bonds are not invalidated by reason of such defect in the proposition as recited, provided, it can be shown from the records of the proceedings of said board that such condition or provision did actually accompany such proposition: and that if the purchaser can resort to such record to cure defects in the proposition as recited, then the defendants have the right to resort to the same record to show all the terms and conditions of the proposition actually voted for at said election. We think we have further satisfactorily shown that the specific recital of a particular proposition, precludes and prevents a general recital, even of compliance, from curing or supplying that wherein the proposition as recited may be or is deficient: that such general recital, connected as it is with the specific recital, does not in any way amount to a declaration or statement, that there was any more of the proposition or of any condition or provision submitted on that occasion, than what has been specifically set forth in the bonds; and in short that the recital of one proposition is the exclusion of all others, or parts of the same proposition, if we are to be confined to the bond itself, for all evidence touching everything that was embraced in the proposition. There being no recital that the necessary provision for the levy of the annual interest tax accompanied the proposition, the purchaser must then resort to the record to establish this fact. He therefore takes the bond with notice that the bond itself has not supplied by way of recital as to this point, what it is necessary for him to prove in order to recover. Taking the bonds with this notice he must be held to have had such knowledge as the record would disclose on examination thereof. "Generally, the power of the municipality, county or other local subdivision of the state to subscribe to the stock of railway companies and issue bonds in payment, is conferred upon certain officers, not absolutely but on *condition of a previous approving popular vote*, or the assent of a majority or some greater proportion of the resident tax payers. * * * * * * * When the legislation is of this character—namely requiring compliance with some such condition befor issuing the bonds—the Supreme court of the United States does not hold as we understand their decision, that the power can be rightfully

exercised unless the condition precedent has been complied with." Dillons Municipal Bonds 19, §9. If the right to issue the bonds is made to depend on the approving vote of the people, much more is the right to levy the tax for their payment, made to depend upon the assent of the voter. It is not the issue of the bonds that effects the voter, it is the raising of the taxes wherewith to discharge and pay these bonds that grinds and oppresses the tax-payers. In fact the authority to issue the bonds and the authority to levy the tax for their payment constitutes but one authority and are so intimately connected that they cannot be separated in their legal relations to each other.

In the case of Chandler vs Dodge county 6 Otto 205, and Fremont &c. vs. Shervin 6 Neb. 48, wherein these bonds were in suit, both the U. S. and state court considered the record of the proceedings of the defendant in the issue of these bonds as proper in determining their validity, and in no way do they intimate that the record should be excluded. Is not this fact of itself sufficient to show that there are no recitals on the face thereof that will estop the defendant from resorting to the record, to show the actual proposition voted for? Does not the plaintiff in alleging that there was a provision accompanying the proposition to levy a one mill tax in his petition in the cases wherein he recovered these judgments, admit that the record is proper to be considered in determining the legal status of these bonds?

This provision is not a separate paper accompanying the proposition but it is a part of the proposition itself. It accompanies it as a proviso or condition, for such it is in legal effect. The bond failing to recite this provision, that very failure advises the purchaser that he must fall back upon the record to cure or supply it and being so advised he is at once put on inquiry as to what the record discloses on that subject and being put on inquiry he is presumed to have had constructive notice of the actual facts appearing on the record, and to have had notice of whatever information he would have gained had he made the examination thereof at the time of his purchase. That examination would have disclosed that the tax-payers and voters had limited the tax to be levied in any one year for the payment of the same, to one mill on

the dollar. He connot now complain if he receives just what the voter by his vote agreed should be levied. As a matter of fact and as it is reasonable to suppose, if the voter had thought he would be taxed for any greater amount he would never have voted for the proposition at all. No injustice is done to the purchaser by giving him the tax the voter has authorized to be levied. The authority to levy is made to depend on the sanction of such popular vote, as a condition precedent, and should not be extended beyond the terms and conditions of the proposition for which the vote was cast. Otherwise the law would be but a snare and a trap to catch the unsuspecting voter.

None of the authorities that we have found and none to which we have been referred have ever held that the mere recitation that the bond was issued *under the law* amounted to a recitation of compliance with the statute when used in connection with a specific recital, which upon its face showed a want of compliance with the statute in an essential particular. This language of itself does not import anything of the kind, and the specific recital of the proposition cuts off all room for any construction of the general terms of the bond that would add to the written or printed terms of the proposition as recited. There being no general recital of compliance that would estop the defendant from showing what the terms of the provision accompanying the proposition actually was, we think this case comes within the rule laid down in the case of Marsh vs. Fulton county, 19 Wall 276, which was a suit upon county bonds issued by Fulton county, Illinois in aid of a railroad company. The court say: "This is a case too where the holder was bound too look to the action of the officers of the county and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. * * * In such case the person dealing with the agent *knowing that he acts by virtue of a delegated power* must at his peril see that the paper on which he relies comes within the power under which the agent acts, and this applies to any person who takes the paper afterwards, for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued." In that case the

bonds were voted to aid one railroad company and the bonds were issued to aid a different railroad company. It was held that the bonds were not authorized by the vote, and that this might be shown by the record, very clearly establishing the rule that the voter and the taxpayer cannot be held beyond the terms of the proposition to which he has assented and for which he has voted. When he has assented to being taxed one mill on the dollar he can not be subjected to a tax of ten or fifteen mills on the dollar.

Plaintiffs counsel contend that having voted for the bonds he cannot limit the amount of the tax to be levied for their payment. We reply that the better rule would certainly be that he has only assented conditionally. If what he has done is to be taken as an assent at all it must be upon the terms and conditions of the proposition through which he has expressed such assent.

Again Sec. 4 of the statute expressly requires that the proposition shall be recorded and a notice thereof should be published for two weeks. This of itself would be constructive notice to the purchaser of the contents of the proposition. See General Statutes, Neb. 1873, p. 448, §4.

Section 2 of the act of 1869 requires, "That the proposition of the question must be accompanied by a provision to levy a tax annually for the payment of the interest on said bonds as it becomes due." The recital of the proposition contained in the bond does not contain this provision, in that particular it fails to comply with this condition of the statute, "And while the recitals of the bonds, when they declare that all the conditions have been complied with are a protection to the purchaser, *yet if the recitals show that there have been a failure to comply with any of the conditions of issue*, or if these recitals are such as to put the purchaser upon inquiry, and by a dilligent prosecution of that inquiry, he could ascertain the defects, he will be held to have notice of them and he cannot enforce the payment of the bond." Burroughs on Pub. Securities 329. So would the bonds in question in this case, were it not for the fact that there was a provision accompanying the proposition to make this one mill levy, as shown by the records of the proceedings of the defendant board. "To be a *bona fide* holder he must be himself a purchaser for value, without notice,

or the successsor of one who has. Every man is chargable with that which the law requires him to know, and of that which after being put upon inquiry he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds which upon their face refer to the statute under which they were issued, *is bound to take notice of the statute and all its requirements.*"

McClure vs. Town of Oxford 94 U. S. 420.

The statute having required of the board to make a record of the proposition and provision, this is of itself constructive notice to the purchaser of its contents, and especially when notice of such record has been duly published, as required by section 4 of the act of 1869, the very statute referred to in the bond itself. This informs such purchaser where he can find the record of the proposition and provision. The presumption is that the officers would and did make the proper record and publication in due time. It is conceded also that in this case it was actually done as required. This taken in connection with the specific recital, the plaintiff was required to make a deligent inquiry as to such record and is presumed to know what was recorded in regard to that matter. Can any good reason be given why the proposition should be required to be recorded and published for two weeks, if such requirement is not for the purpose of notifying all parties dealing with such bonds of the nature and purport of the proposition voted for. Now if such is the object and purpose of such record and publication, then as this bond refers to this statute, the purchaser thereof takes them with notice of this requirement and has constructive notice of the contents of such record. Suppose the bond upon its face recited that the tax to be levied for the payment thereof was limited to a tax of one mill on the dollar, there would then be no question, but the tax should be so limited. Is not the situation of the case the same when the purchaser is put upon inquiry as to what the record shows, and that such record shows that the tax is to be so limited. This limitation would have the same effect in both cases. The tax should therefore be so limited.

Again, the consent of the voter being required his assent is necessary to the validity of the bonds and the bond must be

issued in pursuance of such assent. In a New York case where consent was by statute made necessary for the issuance of bonds it was held "That the only warrant for their action was the consent of the taxable inhabitants required by the act. That consent is the foundation upon which the bonds must rest *and unless the bonds were issued in pursuance of it, they had no validity* and it is beyond the power of the Legislature to impose them as a debt upon the town."

Horton vs Town of Thompson, 71, N. Y. 521–522.

At page 525 the court further say: "*The bond not having been issued in conformity with the consent of the tax payers*, and that being the only action on the part of the town toward the contraction of the debt the Legislature had no power to validate that bond" &c. If the consent of the voter is the foundation upon which the bonds must rest, and his consent goes only to the extent of a levy of one mill on the dollar for the payment of the bonds or interest thereon, then how can there be any other foundation for a levy in excess of that amount. The statute having specifically required the consent of the voter to the levy of the tax for the payment of the interest on these bonds the amount voted must constitute the limit of the tax to be levied for that purpose. There is no other foundation for the levy, and the levy cannot exceed the foundation upon which it rests. But it is contended that section 5 of the act of 1869 makes it "the duty of the proper officers of such county or city to cause to be annually levied, collected and paid to the holders of such bonds a special tax * * * sufficient to pay the annual interest as the same becomes due," presupposes that the provision for such levy provided for in Sec. 2, has been complied with and does not apply to that class of cases wherein the voter has placed a limit on the amount to be levied and wherein the voter has not in the proposition voted for, consented to or authorized the levy of a tax sufficient to pay the annual interest. The defendant may therefore resort to the record of the defendant board to show the actual proposition voted, including the limitation to the one mill levy.

III.

Third: Did the law in force at the time of the issue of these

bonds limit the levy of a tax for their payment to a rate not exceeding one mill on the dollar.

As to the bonds issued by the county under the act of 1866 there can be no question but that section 23 of that act did limit the tax to be levied for their payment to that rate. The question now presents itself does this statutory limitation apply to bonds issued under the act of 1869, and does this statutory limitation apply to these special county bonds, sometimes called precinct bonds? This act of 1866 does apply to such bonds as are issued under the act of 1869, if they *are in pari materia* and if the same rules and statutory provisions apply to these special county or precinct bonds, that apply to county bonds. We are of the opinion that chapter 9 of the revised statutes of 1866 (Rev. stat. 1866 p 40-41 sec 19 and 23) and the act of 1869 (gen. stat. 1873 p 448 and 449) concerning works of internal improvement, are as to the construction of roads and bridges by counties in *pari materia* and that its provisions apply to bonds issued by a county on behalf of a precinct. The late case of Davenport vs. Dodge county, 105 U. S. 237 has held that the bonds in this suit are special county bonds, that they are the debt of the county; that "the only difference in the two classes of debt is that in one all the taxable property of the county is charged with its payment and in the other only a part. * * * In express terms it is stated that precinct bonds shall be the same as other bonds, that is to say county bonds, but must contain a statement of their special nature which confines the area of taxable property to a part rather than the whole of the county." The bonds in question are therefore, properly speaking, county bonds and the powers and restrictions applicable to county bonds apply with equal force and propriety to these special county bonds. If the one mill levy provided for in section 23 (p 41, Rev. Stat. 1866) restricts the levy to that amount in the case of general county bonds issued for the construction of a bridge, then the same restriction applies to these special county bonds.

Precincts under our statutes are mere aggregations of people unorganized and unincorporated, possessing no power to contract or to engage in public enterprises. They have no agents or officers to represent them; they possess no powers they can exercise,

they cannot acquire any rights or incur any liability distinct from the body of the people of the county. "Municipal corporations cannot incur debts and issue their securities for purposes not within the proper scope of such corporations, *even though they have legislative sanction for such transactions.*"

Jones Railroad securities, section 223.

How much less can a precinct having no corporation, no purpose of incorporation, with no power to contract or to bind itself in any way engage in the building of a costly bridge. All the people of the precinct can do, is to assent to being taxed for that purpose by the county. The county issues the bonds, contracts for the improvement, levies and collects the taxes the same as in other county affairs. State vs. Thorne, 9 Neb. 461. When all the voters of the county vote on the question then all the property in the county becomes liable to be taxed for the payment of the bonds, but when the voters of the precinct vote, then the property only of the precinct becomes liable. This is all the difference there is in the two classes of bonds.

"As before stated the management of this sort of precinct indebtedness is made to conform to that of *counties of like character*. The sole distinction is that it concerns a distinct portion only instead of the whole body of the county." State vs. Thorne 9 Neb. 461. "The failure of the legislature to bestow upon precincts the capacity of suing and being sued is doubtless due to the fact of their entire inability either to *assume obligations* or acquire rights *distinct from those of the whole body of the people of the county* of which they are a part." State vs Dodge county 10, Neb. 23. "Precincts are governed by the county commissioners, the governing board of the county, and by the appropriate officers of the state. Their relation to a county is like that of a ward to a city. Having no corporate existence, *no separate municipal authority* they cannot, says again the Supreme Court of the state, in the case last cited (State vs. Dodge County, 10, Neb. 23) enter into contracts directly or indirectly; nor assume obligations which a court might be called on to enforce. Hence the precinct cannot become the obligor of precinct bonds," &c. Davenport vs. Dodge County, 105 U. S. 237. The rulings of the supreme court of the

state are entirely inconsistent with the theory that there can be any such thing as a precinct obligation or bond, and hence the supreme court of the United States very properly held that these bonds, formerly designated precinct bonds, are in substance and reality county obligations and debts upon which the county alone could be sued; and that they only differed from other county bonds as to the area of property upon which the tax for their payment was to be levied. In all other respects they are, in their issue and collection, to be governed by the same instrumentalities, rules, regulations and restrictions as other county bonds. In the one case the assent of the whole body of the people of the county is necessary to authorize their issue and collection and in the other the assent of only a part is necessary for that purpose, the precinct holding the same relation to the county that a ward does to the city. Now then if we succeed in showing that bonds issued for and on account of the whole body of the people of the county, are limited in their collection to a tax of 1 mill per dollar, then on the rules established by the United States and state courts in reference to these special county or precinct bonds the same limitation as to the rate of the tax applies to them also. Whatever limitation applies to the whole, applies to each of the parts of which that whole is composed.

By referring back to the sections of the act of 1866 hereinbefore quoted in full, it will be seen from the provisions of sections 19, 23, and 25 of the act of 1866, it is quite plain the county has the right and power under that act, when authorized by a vote of the people, to borrow money for the purpose of constructing bridges of the character for which the bonds in question were issued, and to levy a special tax for the payment of the money so borrowed. The right to borrow money includes the right to issue bonds to secure the payment of such loan and to issue the bonds direct to the party who agrees to complete the construction of the contemplated improvement.

Bonds were issued by the city of Burlington, Iowa, under the following statute: "That whenever in the opinion of the city council it is expedient to borrow money for any public purpose, the question shall be submitted to the citizens of Burlington, the nature and object of the

loan shall be stated, and a day fixed for the electors of the said city to express their wishes." "Common experience shows that the issuing of bonds by a municipal corporation as material aid in the construction of a railroad is merely a customary and convenient mode of borrowing money to accomplish the object and it cannot make any difference so far as respects the present question, whether the bonds as issued by the defendants were sold in the markets by their officers, or were first delivered to the company and were by their agents sold for the same purpose. Money was what the company wanted, to be expended in the construction of the railroad, and the bonds were issued by the defendants to enable the company to accomplish that purpose." Rogers vs. Burlington, 3 Wall, 654, 666—667. In an action upon bonds issued under this statute of 1866, by Dawson county, Nebraska, to borrow money for the building of a court house in that county, they were held valid obligations. Dawson Co. vs. McNamar, 10 Neb. 280. From which rulings we conclude that bonds issued to procure money is a proper and authorized method to borrow money under this statute of 1866. In fact it would be difficult to conceive how the county was to borrow unless it did issue its bonds or some negotiable paper to secure its repayment. The fact that the bonds were issued in this case direct to the builder of the bridge, as a means of borrowing money, for completing the contemplated bridge, according to the authorities last cited, still leaves their issue, within the act of 1866, and the fact that they recite that they purport to be issued under the act of 1869, does not confine their legal status to that statute. The court house bonds in the Dawson county case (10 Neb. 280—282) also purport to be issued under the internal improvement act of 1869. These statutes being in *paria mataria* as to this particular subject, it can make no difference under which statute these bonds purport to be issued, for they are to be considered as one law. In so far as the matter of constructing bridges is concerned both statutes are on the same subject. The act of 1866 expressly provides for the construction of bridges by the county, and for borrowing money to pay therefor. The act of 1869 by judicial construction is made to cover the same subject, but the statute itself does not in terms provide for it. The former in express terms, the latter by coustruction cover the same subject, and accomplish the same object, in the same way and by the same means. One of two things must be certain, either that the

latter repeals the former, or else they must be taken together and construed to form but one law or one system of laws. Does the latter repeal the former? In the act of 1869 there is no express repeal of the act of 1866. If there is a repeal at all it must be by implication. Let us keep in remembrance that the act of 1869 does not mention bridges at all, but that the act of 1866 does. "In regard to the mode in which laws may be repealed by subsequent legislation it is laid down as a rule, that a general statute without negative words, *will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent.* The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, *and not expressly contradicting* the original act, shall not be considered as *intended to effect the more particular* or positive previous provisions unless it is absolutely necessary to give the latter act such construction, in order that its words should have any meaning at all." Sedgwick Con. Stat. Law, 98 and n. a. "Ordinarily express language is used where a repeal is intended and a repeal by implication is not favored. * * If two statutes on the same subject can stand together without destroying the evident intent and meaning of the latter one, there will be no repeal, * * as where there was an appropriation of a fund to the redemption of certain bonds and afterwards an appropriation out of the fund for a different purpose, it was held the latter act referred to the surplus." Sedgwick C & S, Law 98, n. a. Where a municipal charter contained a proviso that the city credit should not be pledged for over $10,000 without a vote, etc., a subsequent act giving the city power to build a bridge and pledge the credit of the city therefor, without specifying whether a vote should be had or not, was held to be subject to this proviso. Cumberland vs. Magruder 34 Maryland 381. 'So when an act of Parliment had authorized individuals to enclose and embank portions of the soil under the Thames and had declared that such land should be *"free from all taxes* and assessments whatsoever." The *land tax act* subsequently passed, by general words embraced all the land in the kingdom, and the question came before the Kings Bench, whether the land mentioned in the former act had been legally taxed, and it was held that the tax was illegal. William vs. Pritchard 4 Durnford & East, 2. Many other cases to the same effect might be given.

Here are two statutes, the first found in the Revision of 1866, the latter, the internal improvement act of 1869, the former authorizing the county to *borrow money*, and by implication authorizing the issue of bonds to procure money for the construction of bridges, the latter is "an act to enable counties, cities and precincts to *borrow money* on *their bonds*, or to issue bonds to aid in the construction or completion of works of internal improvement." Both relate to the same subject, to be accomplished in the same mode. The former specifically enumerates the construction of bridges as one of the objects of the act. The latter in general terms, and by construction, is made to include the constructions of bridges. Can it be said that " the two acts are irreconcilably inconsistent," and can they "be harmonized by a fair and liberal construction?" Is there any inconsistency, or conflict whatever between these statutes? We think they are not irreconcilably inconsistent and that they can be easily harmonized. In fact they harmonize themselves. The former provides for the borrowing of money to build after the submission of the question to a vote of the people, and precisely the same method is adopted in the latter, and the very fact that the latter refers expressly to the former for the manner of submitting the proposition shows, at least that a full repeal was not intended, and this express reference further indicates that both statutes were intended to operate together as one act, and are to be considered as one system, in so far as they cover the same subject. The former provides that, "When the question submitted involves the borrowing or expenditure of money, the proposition shall be accompanied by a provision to levy a tax for the payment thereof, substantially the same as section 2 of the Act of 1869. The only difference is that the act of 1869 provides for a borrowing by the issue of bonds alone and therefore it provides for the annual payment of the interest by an annual tax, while the act of 1866 is more general in that regard and leaves the county the privilege of borrowing or contracting otherwise for the construction of such bridges in case an opportunity offered. In this however there is no irreconcilable conflict, but to the contrary they dovetail and harmonize. It may be said that section 2 of the act of 1869 is in conflict with section 23 of the act of 1866, in this,

that section 2 provides for the levy of a tax annually for the payment of interest, while section 23, limits the levy to one mill on the dollar in any one year. If the interest on the amount of bonds voted for would be paid by the one mill levy, then in that case there would certainly be no conflict. There is not then necessarily any conflict. If the county would issue bonds only in such amounts that the one mill levy would pay both principal and interest thereof no case would ever arise creating any conflict between the two acts concerning the payment of the obligations incurred in building bridges. It is only when the county issue bonds to such an amount that the one mill levy will not pay both principal and interest thereof, and holding that such overissue is authorized by the act of 1869 that even the appearance of a conflict arises. Suppose that under the act of 1866, a like amount was issued, under section 19 of the latter act, would not the same appearance of conflict arise between that section and section 23? Most certainly there would. And yet, can it be possible, that such claim of conflict, could or would be sustained? Neither the act of 1869 nor 1866 places any limitation upon the amount of bonds to be issued thereunder. The same appearance of conflict would arise in the case of an overissue of bonds, no difference whether it be made under the one statute or the other. It does no violence to the statute of 1869 to so construe it that the taxes provided for in Sections 2 and 5 of the act of 1869, shall be confined within the one mill levy. It does no violence to the language of those sections to so construe them. In a city charter where the charter limited the power of taxation to one per cent. it was held that it could not be compelled to levy a greater amount to pay a judgment rendered in the United States courts. The court by Justice Miller say: 'The rule also is well understood that a repeal by implication can only arise when that is the necessary inference from the impossibility that both of the acts, supposed to be in conflict, can stand. * * * But in the present case there is no such necessary conflict. The provision of the code can have its effect by compelling the city council to levy the tax *so far as it has power to levy it.* The provisions of the charter can stand as they were intended, *as a useful and just limitation of that*

power. * * The previous year the city council of Burlington, as appears by the answer in this case, only levied a tax of one-half per cent. Undoubtedly if this was found to be inadequate to meet the current expenses, and to provide a fund to meet the judgment, it was the duty of the council under § 1897 of the code to so increase the tax, *inside of one per cent.* as to raise that fund if it could be done * * * * * "Was it meant that they should absolutely at once, levy a tax sufficient to pay the debt without regard to the one per cent. limitation in the previous section? or was it meant that they should use *such taxing power as they had for that purpose, and no more?* If the former is the sound construction, then the limit upon the taxing power is nugatory, and it makes no difference how strongly the legislature, or the charter adopted by the people may forbid excessive taxation, the authorities of the city, may, by resorting to the power to make contracts impose upon the property holders a tax unlimited in amount or duration. The wisdom of this provision in the code, and in the charter of the city of Burlington has been amply vindicated by events occurring since their enactment. United States vs. Burlington, 2 Am. Law Register 394. Substantially to the same effect are the cases of Clark vs. Davenport, 14 Iowa 494, Burns vs. Atchison, 2 Kansas, 454, and United States vs. Macon Co., 99 U. S. 582. The case at bar is a much stronger case in favor of the limitation than either of these cases. They are based upon geneneral limitations to the power of taxation, found in the law. The law of 1866 expressly places a specific limitation to the power of taxation for the identical purpose for which the bonds in question were issued. These statutes being in *pari materia* this limitation to one mill levy (found in Sec. 23,) contained in the act of 1866, is to be considered as engrafted into, consolidated with and as forming part of the act of 1869, and is as one law, or one system of law, to be treated and held as part of that act the same as if it were originally inserted therein. This can work no hardship or injustice to the holder thereof for he takes them with full notice of the statutory provisions on this subject. The bond is not invalidated by reason thereof, but the collection thereof is simply limited to a tax of one mill on the dollar and in this way payment in cases

of overissue may be partially postponed after the maturity of the obligation. Both statutes may well stand together and the latter have full force and effect. The former prescribes the mode and manner of submitting the proposition to the vote of the electors. It specifically designates the object for which the money borrowed may be expended. It provides for the collection of the tax and the rate of interest such tax shall draw after becoming delinquent. It clothes the commissioners with the power to act on behalf of the county and prescribes the mode of their action in conducting the election, and the issue of the bonds. It places a limitation on ths amount of tax. In short, without incorporating the act of 1866 into the act of 1869, the latter could not be executed. The act of 1869 has plenty of ground on which to stand. It provides more specially the nature of the proposition to be submitted. It allows the commissioners to issue county bonds not only on the vote of the whole body of the county, but also upon the vote of the precinct. It prescribes on what property the tax shall be levied and collected in the case of a precinct vote. It increases the objects for which the vote may be cast and the tax levied. There is no necessary conflict between the two, and with a liberal construction they can stand together as forming one law and one harmonious system.

There is, and can be, no pretense for contending that the act of 1866 was not in full force and unrepealed by any express repeal thereof at the time the bonds in question were issued, viz.: Sept. 1st, 1871. Nor do we think there is any room to contend that there was an implied repeal thereof, for we find the supreme court of Nebraska sustaining bonds for a court house, issued July 1st. 1873. See case of Dawson County vs. McNamar 10 Nebraska 276. If the statute is in force as to court house bonds, where, we would ask, is the statute which either expressly, or by implication, repeals it as to bridge bonds? The statute of 1866 being in full force at the date of the bonds in question, the county could under that statute proceed to borrow the money to build this same bridge, and issue its bonds for the payment of the money so borrowed. Can it be possible that the legislature intended these statutes to stand as separate and distinct laws, both covering the

identical same subject, executed by the same instrumentalities in the same manner and under the same regulations? We think not. Being upon the same subject, why should they not be taken as one law. The act of 1869 in its substance and effect is merely amendatory of, and enlarges the field and scope of the act of 1866, and the act of 1866 furnishes the method and mode of operation under the act of 1869, and places wholesome and necessary restraints upon the power of the county board in regard to the matter of borrowing money for bridge purposes.

These statutes so far as they relate to the subject of the construction of bridges are upon the same subject and therefore in *pari materia*. "Several acts *in pari materia* and relating to the same subject, are to be taken together, and compared in the construction of them, *because they are considered as having one object in view* and as acting upon one system. This rule was declared in the cases Rex. vs Loxdale and the Earl of Ailsbury vs. Pattison and the rule applies though some of the statutes, may have expired or are not referred to in the other acts. The object of the rule is to ascertain and carry into effect the intention; and it is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy and was intended to be consistent and harmonious in its several parts and provisions."

1 Kent Com. 463 (marginal paging.)

"Statutes are in *pari materia* which *relates to the same person or thing or to the same class of persons or things.* * * * It is a phrase applicable to public statutes or general laws, made at different times and in reference to the same subject." United Soc. vs. Eagle Bank 7 Conn.457, "It is an established rule of law that all acts *in pari materia* are to be taken together as one law.'

9 Bacons Abgt. 243 (Title Statutes Letter I, No. 3.

Can there be any question about the power and right of the county at the time the act of 1869 took effect to proceed under the act of 1866 to borrow money for the construction of bridges! We think there can be none because that act was not repealed and if so the two statutes as to the construction of bridges are upon the same identical subject. Two statutes upon the same subject, designed to accomplish the same object in substantially the same way cannot be treated as separate and

distinct legislation, but must be taken together as one law. It is not necessary that these statutes should be coextensive in their terms and provisions. It is sufficient if part of one covers the same subject that is covered by the other, as in the case of the bankrupt and pauper laws of England. If they were coextensive one would be only a repetition of the other.

Effect must be given to every clause of a statute, if possible. It is a cardinal rule that in the construction of a statute, effect is to be given if possible, to every clause and section of it, and it is the duty of courts as far as practicable, so to reconcile the different provisions, as to make the whole act consistent and harmonious" Atty. Gen. vs. Detroit 2 Mich. 142. Commonwealth vs. Alger, 7 Cush.53, 89. "A statute ought upon the whole, to be so construed, that if it can be prevented, no clause, or word shall be superfluous, void, or insignificant." 9 Bacons Abgt 239 240. (Title statute letter I No. 2.

From the rules laid down by the authorities it is apparent that between these two statutes there is no irreconcilable conflict such as to prevent them from standing together, that a liberal construction will readily harmonize them; that being upon the same subject they are to be taken as one law; that taken as one law, effect must be given to every clause of each statute then we ask what effect can be given to the one mill limitation in Sec. 23, of the act of 1866, if sections 2 and 5 of the act of 1869, are to be constrted as authority for the levy of a tax to an unlimited amount. "But if * * * *general words are to be used which import more than seems to have been within the perview of the law, or of other parts of the law, and these expressions can be restrained by others used in the same law or in any other upon the same subject they ought to be restrained.*" 9 Bacons abridgement 240 (Title Statutes Letter I No. 2.) The limitation to one mill on the dollar is certainly a proper one, and at the time, in view of the extravagant expenditure of the public moneys for projected and often useless enterprises, was very much needed. We can readily see how effect can be given to that limitation and also to the language of sections 2 and 5 of the act of 1869. Full effect can be given to their language by construing it, or restraining it so as not to authorize counties for the purpose of building bridges, to

contract any debt that will not require more than the one mill levy to pay both the principal and interest thereof. Within that limit a tax may be levied sufficient to pay both principal and interest, but not to exceed that amount. This is the latitude that is given to the "general words used in" them, "which are to be restrained by others used in the" former law "upon the same object," and this also conforms to the rule laid down by the courts in the following cases. Clark vs Davenport, 14 Iowa, 494. Burns vs. Atchison, 2 Kan. 414. Cumberland vs. McGruder, 34 Md. 381. United States vs. Burlington, 2 American Law Register 394. United States vs. Macon Co. 99, U. S. 582. But it may be claimed that the law of 1869 repeals all acts inconsistent therewith. A general repealing clause of this character adds but little to the force of a repeal by implication. "The repeal extends only so far as the inconsistency extends." Elrod vs. Gilliland 2 Geo 469, and this is so even though there is an express repeal of all inconsistent acts People vs. Deerick 20 Cal. 94, Sedgwick Con, and Statute Law 102 and note. We think we have already clearly and sufficiently shown that between these no necessary conflict or inconsistency whatever, exists in fact; there is neither a conflict or any inconsistency.

This limitation is too just and too necessary not to require the most favorable consideration at the hands of the courts and should not be set aside except for the strongest and most potent reasons. Again, it will be claimed that the act of 1866 relates to an extraordinary expenditure of money by counties, and that the act of 1869 relates to internal improvements. It is difficult to see this distinction, and still more difficult to perceive any reason why a bridge built under the act of 1866 by means of borrowing money procured by issuing bonds is not as much a work of internal improvement as though the same bridge was built by means of bonds issued under the act of 1869. The character of the improvement is certainly not changed in the least, whether constructed under the one act or the other or both

Plaintiff's counsel contends that the cases cited by him show that the expression, "under the act," etc., is equivalent to a recital of compliance with the statute in the issue of the bonds. We

have failed to discover such holding therein. But he must go further than this, and show that such general recital has this effect concerning a statutory provision about which there is a specific recital upon the face of the bond.

He further contends that the case of Fremont B. A. vs. Shervin 6, Neb., 48, has decided that the form of these bonds is such as to cut off defenses when in the hands of innocent purchasers. Let us suppose that case does so decide, what of it? It was an injunction suit to restrain the levy of any tax to pay the interest on these bonds, and not to restrain or limit the levy to one mill on the dollar. The grounds alleged for the injunction was the invalidity of the bonds. First, because the bridge was to be a toll bridge—p. 49. Second, because the vote therefor, was invalid on account of there being no provision for the levy of a tax to pay these bonds when they fell due, as required by Sec. 19, Statute of 1873. The court hold these objections are not sufficient to invalidate the bonds in the hands of an innocent purchaser. There was nothing before the court to show that the one mill levy was insufficient to pay these bonds, for they say, "It is true that the amount of the levy is limited to one mill on the dollar, but the presumption is that this rate was considered amply sufficient by the commissioners, and for ought that now appears, it is so."—p. 59. As to whether there could, or could not, be a levy greater than one mill on the dollar, the court do not say. Inferentially, we take it that the court would hold this limitation good, because they say: "The record shows that the *proposition* to levy a tax as it should be found necessary, not exceeding one mill on the dollar valuation on all the taxable property in Fremont precinct, to keep up the necessary repairs on the bridge, to meet the contingent expenses, and also to pay the interest and principal of said bonds as they fell due, was adopted. There was, therefore, a full compliance with the requirements of section nineteen, chapter *thirteen*, general statutes, upon which this objection is based"—pages 52 and 53. If the court in this case intimate anything as to the legal effect of this limitation it is: that it is sufficient to sustain them and a "full compliance" with the statute. Can there be any good reason, for holding that it is not a binding limitation as to the amount of

the tax. Sec. 19 of chapter 13, General Statutes of Neb. p. 236 the one referred to by the Neb. Supreme court, is as follows; "Sec. 19, when the question submitted involves the borrowing or expenditure of money, the proposition of the question must be accompanied by a provision to levy a tax for the payment thereof, and no vote adopting the question proposed shall be valid, unless it likewise adopt the amount of tax to be levied to meet the liabilities incurred." The act containing this section was passed Feb. 27, 1873, nearly three years subsequent to the date of the vote taken upon the bonds in question. This is the section to which counsel for the plaintiff refers, as section 19 of chapter *nine* of the act of 1866. The court will find upon comparison of section 19; of chapter *thirteen* of the act of 1873 quoted in full, just above, is altogether different from section 19, of chapter *nine* of the act of 1866, quoted in the first part of this argument. The remark of counsel, to the effect, that the Supreme court of Nebraska had held, that section 19 of the act of 1866, did not apply to this class of bonds, is no doubt due to an oversight on his part, in assuming that section 19 (of the act of 1873) of chapter *thirteen* of the General Statues, was the same as section 19, of chapter *nine* of the revised statutes of 1866. The number of the sections are the same, but the chapters are different, and the substance of the sections are altogether different, and do not in any way relate to the same subject. The court will further notice that the first part of the above section 19. of the act of 1873, is in substance the same as the first part of section 2, of the act of 1869, consequently the remarks of the court in Fremont B. A. vs. Shervin in regard to section 19 of chapter 13, as to the proposition containing the one mill levy limitation, being in "full compliance" therewith, will apply with equal force to section 2, of the act of 1869. It in full compliance, then it must follow, that the limitation is in no way in conflict with Sec. 2. The remaining part of the opinion merely goes to show that Sec. 19, of the act of 1873, does not apply to this class of bonds, and can have no further application to the case before the court, than to dispose of the question, as to to the validity of the bonds, in no way attempting to dispose of the question as to the amount of the levy, which was not then before the

court. The attention of the court was not called to the act of 1866 in that case, and does not seem to have been, until the Dawson county case came up, as the remarks of the court are to be taken alone as having reference to the nature and subject of the case then before it, and is to be confined thereto, what is said outside of that is mere *dicta*,

The case of Chandler vs. Dodge County 10 Nebraska, 20 was an application for a mandamus to compel the county board to levy a tax to pay judgments recovered upon these same bonds in the U. S. circuit court. The court disposed of the case by holding that the judgments recovered in the U. S. court are nullities; that the proper remedy is by mandamus: that the precinct is not a sueable body, and that mandamus is the only remedy to enforce the collection of these bonds. The court in that case merely states the language of section 2 of the act of 1869 as to the scope of the statute without in anyway attempting to construe it as to the amount of the levy required to be made in cases of the kind in question. The attention of the court was not, in that case, called to this limitatation or to any limitation, and hence the court do not attempt to pass upon this subject in any way whatever and for the very good reason that the subject was not then before the court.

Plaintiffs counsel contends that if the bonds in question are held valid, then all reasons which go to sustain their validity apply with equal force to sustain the levy of a tax sufficient to pay them in full, including the annual interest as it becomes due. This is not the law. In the case of the United States vs. Macon county 99 U. S. 582 while the bonds were held valid yet the limitation of a tax to one-twentieth of one per cent for their payment provided in the statute was sustained, although far from being sufficient to make full payment. It does not follow that the bonds being held valid, a levy sufficient to make full payment is authorized or required.

In the case at bar the validity of the bonds are not called in question. The only question presented in this action is this, should the levy be restricted to one mill on the dollar. We think on reason and authority in view of the bonds as they stand, the

the proposition submitted for their issne, the law as it existed, at the time of their issue the demurrer to the answer was properly overruled and that the tax should be so limited.

RECAPITALATION.

1st. The demurrer admits the facts set forth in the answer to be true.

2nd. The contract and the law in force at the time of the issue of these bonds fixes and establishes the rights and liabilities of the parties thereto.

3d. The statutes requires that the provision to levy a tax to pay the interest annually becoming due thereon shall accompany the proposition voted for and this is peremptory and mandatory.

4th. That this provision is a condition or proviso forming part of the proposition.

5th. The specific recital on the face of the bonds, of the proposition stated therein to be voted for, does not contain this provision, and in that particular fails to comply with the statute.

6th. That this specific recital excludes all inferences and presumptions as to such proposition, that might be claimed from a general recital, in the absence of such specific recital, and cannot supply presumptive evidence of the existence of the provision.

7th. That the expression "under the act" &c. especially when taken in connection with such specific recital, cannot be held as a recital of compliance with the statute and hence the specific recital being deficient, and upon its face showing a want of compliance with the statute as to this accompanying provision, the defendants are not estopped from resorting to the record to show the actual proposition voted for.

8th. That the proposition voted for as shown by the record contains a provision limiting the tax to be levied to a rate not exceeding one mill on the dollar.

9th. That the record of the proceedings of the county board is proper and legitimate proof of this fact.

10th. That the statute under which these bonds were issued expressly provides for the recording of the proposition, and a publication as to its adoption: and this is in legal effect notice to all who may purchase such bonds, and especially is this the case when the bonds up-

on their face show a want of compliance with the statute in an essential particular.

11th. That as to the matter of constructing bridges, at least, the statute of 1866, and that of the improvement act of 1869, are upon the same subject and are to be taken as one law.

12th. That being so taken the limitation of the levy in this class of cases, being restricted to a levy of one mill on the dollar, in the 23d section of the act of 1866, the act of 1869 is to be considered and held, as though that limitation was inserted in the act of 1869.

13th. That in the cases of Fremont B. A. vs. Shervin, and Chandler vs. Dodge Co. there is nothing opposed to these views of the law.

14th. That in these cases the attention of the court was not called to the effect of this one mill limitation, as a restriction upon the amount to be levied, nor was it called to the act of 1866, as to the same limitation, nor did the court in either of these cases, attempt to pass upon this question. In the first case the question passed on by the court was that of the *validity* of the bonds, and in the second as to the validity of the judgments in U. S. circuit court. The case of Chandler vs. Dodge Co. was virtually overruled by this court in Davenport vs. Dodge Co. 105 U. S. 237.

15th. The limitation in the proposition as actually voted for, was evidently based on the limitation in the law found in Sec. 23 of the act of 1866, and which was evidently then regarded as the law of this state, in relation to the amount authorized to be levied for such purposes.

The original amount of these bonds is $50,000 They bear ten per cent interest, and have run ten years, and now amount to over $100,000. The fact alleged in the answer of respondents that the board have from year to year made this one mill levy goes to show that the bondholders have heretofore been satisfied with that limited amount. This debt is very heavy upon a single precinct. The bridge to start with has long since been washed away, and was worthless to start with. The bonds have been shifted into the hands of persons claiming, at least, to be innocent holders. No doubt under these circumstances they were purchased at a big discount. A levy suffiicient to pay these bonds would be a